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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 377

ANGLO-CHILEAN NITRATE SALES CORPORATION, APPELLANT,

vs.

THE STATE OF ALABAMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

FILED SEPTEMBER 19, 1932

(37,074)

(37,074)

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

NOTICE OF APPEAL—Filed April 14, 1930

This notice to be given and filed with the Secretary of the State Tax Commission of the State of Alabama, and with the Register of the Circuit Court of Montgomery County, Alabama.

Take notice that on this day the Anglo-Chilean Nitrate Sales Corporation, a foreign corporation organized under the laws of the State of New York, has taken an appeal from that final assessment of the said State Tax Commission made against the said foreign corporation on the 31st day of March, 1930, in the amount of $1425.69, which said assessment was made as an assessment of a tax on the franchise of the said corporation; the said assessment under the laws of the State of Alabama having the force and effect of a judgment against the said corporation. This appeal is taken by the said corporation from the said final assessment and judgment to the Circuit Court of Montgomery County, sitting in equity, as provided by law; the said corporation having given bond with good and sufficient surety in double the amount of the said final assessment payable to the State of Alabama, which bond is a good and valid bond and sufficient for the purposes of this appeal under the laws of the State of Alabama; and which said bond has been duly taken and approved by the Register of the said Circuit Court of Montgomery County; the said bond being conditioned to pay such judgment as may be rendered against the said foreign corporation in the said Circuit Court.

This notice is hereby given for and as the act of said Anglo-Chilean Nitrate Sales Corporation by its agent duly authorized to give this notice, on this the 14th day of April, 1930.

Anglo-Chilean Nitrate Sales Corporation, a Corporation, by Lange, Simpson & Brantley, Its Duly Authorized Agents and Attorneys.

I do hereby certify that I have on this the 14th day of April, 1930, filed the above notice with the Secretary of the State Tax Commission of the State of Alabama, and also [fol. 3] with the Register of the Circuit Court of Montgomery County, Alabama.

R. B. Barnes, of Attorneys for Anglo-Chilean Nitrate Sales Corporation.

[File endorsement omitted.]

Bond of appeal for $2,851.38, approved and filed April 14, 1930, omitted in printing.

[fol. 4] BEFORE STATE TAX COMMISSION OF ALABAMA

SECRETARY'S CERTIFICATE

I, Julia Klinge, Secretary of the State Tax Commission, do hereby certify that the following pages numbered one to five, constitute a full and complete transcript of the records of the State Tax Commission, showing the rate and the assessment of the franchise tax of the Anglo Chilean Nitrate Sales Corporation for the year beginning January 1, 1930, together with the notices filed by the attorneys for said corporation for the purpose of an appeal from the assessment made by the State Tax Commission to the Circuit Court of Montgomery County sitting in equity.

Julia Klinge, Secretary State Tax Commission.
(Seal.)

BEFORE STATE TAX COMMISSION OF ALABAMA

NOTICE OF APPEAL

THE STATE OF ALABAMA,
Montgomery County:

This notice to be given and filed with the Secretary of the State Tax Commission of the State of Alabama, and with the Register of the Circuit Court of Montgomery County, Alabama.

[fol. 5] Take notice that on this day the Anglo-Chilean Nitrate Sales Corporation, a foreign corporation organized under the laws of the State of New York, has taken an appeal from that final assessment of the said State Tax Commission made against the said foreign corporation on the 31st day of March, 1930, in the amount of $1,425.69, which said assessment was made as an assessment of a tax on the franchise of the said corporation; the said assessment under the laws of the State of Alabama having the force and effect of a judgment against said corporation. This appeal is taken by the said corporation from the said final assessment and judgment to the Circuit Court of Montgomery County, sitting in equity, as provided by law; the said corporation having given bond with good and sufficient surety in double the amount of the said final assessment payable to the State of Alabama, which bond is a good and valid bond and sufficient for the purposes of this appeal under the laws of the State of Alabama: and which said bond has been taken and approved by the Register of the said Circuit Court of Montgomery County; the said bond being conditioned to pay such judgment as may be rendered against the said foreign corporation in the said Circuit Court.

This notice is hereby given for and as the act of said Anglo-Chilean Nitrate Sales Corporation by its agent duly authorized to give this notice, on this the 14th day of April, 1930.

Anglo-Chilean Nitrate Sales Corporation, a Corporation, by Lange, Simpson & Brantley, Its Duly Authorized Agents and Attorneys.

I do hereby certify that I have on this the 14th day of April, 1930, filed the above notice with the Secretary of the State Tax Commission of the State of Alabama, and also with the Register of the Circuit Court of Montgomery County, Alabama.

R. B. Barnes, of Attorneys for Anglo-Chilean Nitrate Sales Corporation.

STATE OF ALABAMA,
State Tax Commission,
Montgomery, Alabama:

[fol. 6] BEFORE STATE TAX COMMISSION OF ALABAMA

In the Matter of the Assessment for Franchise Tax of the ANGLO-CHILEAN NITRATE SALES CORPORATION, a Corporation Organized under the Laws of the State of New York, Qualified to do Business in the State of Alabama

ASSESSMENT OF FRANCHISE TAX

In this matter the State Tax Commission upon the report of the said Anglo-Chilean Nitrate Sales Corporation, filed with the Commission on to wit: March 17th, 1930, does find that the capital employed in the State of Alabama by the said Anglo-Chilean Nitrate Sales Corporation amounts to Seven Hundred and Twelve Thousand Eight Hundred and Forty-six dollars and seventy-two cents ($712,846.72) as shown by said return, and based on said amount of capital employed the State Tax Commission does hereby assess as Franchise Tax for the year 1930 against the said Anglo-Chilean Nitrate Sales Corporation, the sum of One Thousand Four Hundred and Twenty-five dollars and sixty-nine cents ($1,425.69) as provided by the Revenue Act approved July 22nd, 1927, being Acts of the Legislature of Alabama, page 139.

Done at the Capitol, Montgomery, Alabama, this 31st day of March, 1930.

H. S. Long, Chairman State Tax Commission. Julia Klinge, Secretary State Tax Commission.

BEFORE STATE TAX COMMISSION OF ALABAMA

FOREIGN CORPORATION RETURN FOR FRANCHISE TAX

This return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1930.

Special Notice

Payment of the franchise tax becomes due on April 1st and will be delinquent if not paid on or before May 1st, except as hereinafter stated.

Returns must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th. A penalty of $10.00 per day for each day's failure to make returns accrues from the above date. On receipt of proper [fol. 7] returns the Commission will assess the tax and will notify all taxpayers of the amounts due. A penalty of 1% per month, and interest at the rate of 8% per annum are provided by law for failure to make payment of the tax on or before May 1st unless the corporation filed its return within the time provided by law, or unless the time for making return shall have been extended by the State Tax Commission in which event the penalty and interest do not accrue until thirty days after assessment and notice from the Sate Tax Commission. Corporations, therefore can protect themselves from penalties and interest only by filing returns on or before March 15th, and by remitting promptly upon receipt of notice of assessment by the State Tax Commission. Return must be executed by the president, or other executive officer, or the Secretary of the corporation.

New Corporations.—See instruction No. 7 as to time for filing returns, penalty, etc.

Instructions

1. The franchise tax rate is two dollars on each thousand dollars (fractions of a thousand in proportion) of the actual amount of capital employed in this State by foreign corporations and runs accordingly to the calendar year.

2. Every corporation doing business in Alabama, not organized under the laws of this State, is required to render a franchise tax return.

3. There must be attached to every return a condensed balance sheet drawn from the books of the corporation as at December 31st, 1929, or as at the close of the corporation's fiscal year ended in 1929 in cases where the books are not regularly closed at the end of each calendar year. Such balance sheet must show the value of each asset listed within and without the State of Alabama. No return will be accepted unless a balance sheet is attached, or unless the return is accompanied by a statement properly sworn to, setting forth a satisfactory reason why such balance sheet cannot be furnished.

4. Duplicate blanks will be sent to every corporation. Only one report should be forwarded to the State Tax Commission. The other blank should be filled out and retained by the corporation for its own files.

5. Question No. 10 in relation to property assessments is [fol. 8] intended to gain information necessary to enable the State Tax Commission to distribute the tax, as required by law, among the counties which may be entitled to a pro rate part thereof. In answering this question give aggregate valuation of the property as returned by the taxpayer in each county as at October 1, 1929. Do not give the hundred per cent valuation, but give the sixty per cent valuation as returned for assessment by the taxpayer. If assessment return has not been made to the Tax Assessor for the current tax year beginning October 1, 1929, in answering question No. 10, give the assessed valuation as fixed by law for the tax year beginning October 1st, 1928.

6. Do not fail to answer each question in the return. If unable to give information required, state reason on return why such information cannot be furnished.

7. A foreign corporation entering the State on or before July 1st of the current year will be subject to a franchise tax for the full year, but if such corporation enters the State after July 1st of the current year it will be subject to only one-half of the year's tax for the remainder of the current year. Such corporation is required to file return with the State Tax Commission ten days from the date of qualification to do business in this State. Failure to file return with the State Tax Commission within ten days subjects the corporation to a penalty of $10.00 per day.

State of Alabama

Foreign Corporation Return for Franchise Tax.

This return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1930.

I, W. E. Bennett, as Secretary of Anglo-Chilean Nitrate Sales Corporation, a foreign corporation, for the purpose of assessing its franchise tax for the year 1930 in ac-

cordance with the provisions of Sections 53 to 71, inclusive of the Revenue Act approved July 22, 1927, do make the following report:

1. Organized on 31st day of August, 1927, under the laws of the State of New York.

2. Principal place of business 120 Broadway, New York, N. Y.

[fol. 9] 3. Qualified to do business in Alabama on the 10th day of October, 1927.

4. Principal place of business in Alabama: None.

5. Kind of business conducted in Alabama: Sale of Nitrate of Soda Imported from Chile and stored in Alabama in Original Packages.

6. Name of authorized agent in Alabama: Fred S. Ball and Fred S. Ball, Jr.

7. Address of authorized agent in Alabama: 712-20 First Natl. Bank Bldg., Montgomery, Ala.

8. Where should correspondence relating to franchise tax be addressed: Room 3523 120 Broadway, New York, N. Y.

9. To whom should correspondence relating to franchise tax be addressed: Anglo-Chilean Nitrate Sales Corporation, c/o J. A. Endweiss, Comptroller, Room 3523, 120 Broadway, New York, N. Y.

10. Property assessed for taxation in Alabama as at October 1, 1929 (this information for distribution of tax, as provided by Section 57 of Revenue Act approved July 22nd, 1927): None.

(Information required below to be furnished from the Books of the Corporation as at December 31, 1929, or at close of fiscal year ended in 1929.)

11. Cash on hand and on deposit in Alabama: None.

12. Accounts and notes receivable due by residents (corcorporations or individuals) of Alabama: None.

13. Accounts and notes receivable due by persons (individual or corporate) not residents of Alabama arising from

shipments or sales of articles manufactured in Alabama, or from stores, warehouses or storage depots maintained in Alabama: None.

14. Amount of prepaid insurance, interest, etc., and other deferred debits in Alabama: None.

15. Book value of capital stock owned in corporation organized under the laws of Alabama: None.

16. Book value of bonds of the State of Alabama or of any county or municipality thereof or of corporations organized under the laws of Alabama: None.

17. Book value of property assessed for taxation in Alabama: None.

[fol. 10] 18. Book value of property, both tangible and intangible, in Alabama not assessed for taxation in Alabama and not included in answering Questions 11 to 17 above: 33,455,763 lbs. (net weight) of nitrate imported into Alabama by corporation and in store there in original package, book value $712,846.72

$712,846.72
2.00
$1,425.69 Tax

19. Book value of other assets in Alabama not enumerated above: None.

20. Loans secured by mortgage on real estate in Alabama on which the recording privilege tax has been paid and not included in amounts under Questions 12 and 13: None.

21. A condensed general balance sheet, showing separately the value of each asset within and without the State of Alabama, drawn from the books of the corporation as at December 31, 1929, or as at —— is hereto attached and made a part of this return.

Balance-sheet as at December 31, 1929

Assets		Liabilities	
Employed in Alabama: None.		Capital Stock.....	$100,000.00
Outside of Alabama: ——.		Accounts Payable.....	5,094,647.54
*Nitrate on hand.....	$5,022,676.90	Deficit (Red).....	71,429.12
Accounts receivable...	59,457.06	Total Liabilities.	$5,123,218.42
Prepaid Commissions..	3,468.13		
Prepaid Insurance.....	603.92		
Cash	37,012.41		
Total Outside of Ala.	$5,123,218.42		
Total Assets....	5,123,218.42		

*Of the above, "Nitrate on Hand" 33,455.763 lbs., valued at $712,486.72, were in storage in original packages in Alabama on December 31, 1929, having been imported from Chile, S. A.

22. A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties:

[fol. 11] See No. 18.—Imported from Chile and stored in Mobile, Alabama, in original imported packages.

(Signature of officer:) W. E. Bennett. (Name of corporation:) Anglo-Chilean Nitrate Sales Corporation.

STATE OF NEW YORK,
County of New York:

Before me, Joseph O. Johnson, a Notary Public in and for said County and State on this the 14th day of March, 1930, personally appeared W. E. Bennett known to me to be the Secretary of Anglo-Chilean Nitrate Sales Corporation a foreign corporation and being by me first duly sworn, doth depose and say that the foregoing statement made to the State Tax Commission of Alabama, for the purpose of assessing the franchise tax of said corporation is a true, full and correct statement.

Witness under my hand this 14th day of March, 1930.

Joseph O. Johnson, Notary Public, —— County, —— State. (Seal.)

(This space for use of State Tax Commission)

F-1040.

Dated: Received —— —, ——. Audited by G. O.

Amount of franchise tax determined by Tax Commission: $1,425.69.

Corporation notified March 31, 1930.
Attorney General notified April 14th, 1930.
Filed in office May 19th, 1930.

Jno. R. Matthews, Register.

[fol. 12] In Circuit Court of Montgomery County

Petition—Filed Sept. 30, 1931

To the Honorable Judges of said Court:

Your petitioner, Anglo-Chilean Nitrate Sales Corporation, a foreign corporation, shows unto your Honors as follows:

1. Your petitioner avers that it is a corporation duly organized and chartered under the laws of the State of New York; that it was duly incorporated in the State of New York under the laws thereof on October 31st, 1929, and has since that time continuously been a corporation; that your petitioner duly qualified to do business in the State of Alabama on October 10th, 1927, and has since that date and is now qualified to do business in this State; that the respondent in this case is the State of Alabama of the United States of America.

2. Petitioner further avers that between October 10th, 1927, and March 31st, 1930, petitioner was engaged in the business of importing into the United States nitrate of soda from Chile, South America, through the Port of Mobile, Alabama, and other ports of the United States; that said corporation sold and delivered said nitrate of soda to consumers both within and without the State of Alabama; that on December 31st, 1929, said corporation had on hand in the State of Alabama 33,455,763 pounds of nitrate of soda which had been imported by it into the United States from Chile, South America, which was then stored in a public warehouse in the City of Mobile, Alabama; that all of said nitrate of soda when imported into the United States through the Port of Mobile, Alabama, was contained in bags, each bag containing approximately 100 pounds of nitrate of soda; that said nitrate of soda was stored in a public warehouse in said original bags subsequently sold

and delivered by the petitioner in the original bags in which the same was imported; that between the date of importation of said nitrate of soda into the United States through the Port of Mobile, Alabama, and its sale and delivery by the petitioner, none of said nitrate of soda had been removed from the original bags in which it was imported, nor have the original bags at any time been broken into.

3. That since October 10th, 1927, the principal office of petitioner has been and is now at 120 Broadway, New York City, New York; that between October 10th, 1927, and March 31st, 1930, said corporation sold said nitrate of soda [fol. 13] through a salesman in the State of Alabama, who was compensated by commissions on his sales and who paid his own operating expenses; that all orders taken by said salesman were taken subject to the approval of the New York office of your petitioner, and that no orders so taken were effective until signed and approved by your petitioner in New York City; that when any such orders were accepted and approved by your petitioner in New York City, directions were then given by the Home Office of the petitioner to ship the nitrate of soda so ordered to the consumers in the original bags in which the nitrage of soda was imported into the United States and stored in warehouse in Mobile, Alabama; that such directions were given by the New York Office of your petitioner to Walsh Stevedoring Company of Mobile, Alabama, an entirely independent contractor, which had an arrangement with your petitioner to handle the importation of said nitrate of soda for petitioner, store the same in a public warehouse, and forward it to the particular customer after a sale thereof by petitioner; that all nitrate of soda that has been sold by petitioner and delivered by it to the warehouse in Mobile, Alabama, between October 10th, 1927, and March 31st, 1930, as aforesaid, was packed in Chile, South America, shipped from Chile and imported into the United States through the Port of Mobile, Alabama, all solely in the said original bags.

4. That upon receipt from the New York Office of your said petitioner of directions to ship nitrate of soda in pursuance of a sale as hereinbefore described, said Walsh Stevedoring Company forwarded said nitrate of soda to the ultimate consumer, together with a bill of lading, the ship-

ping documents being sent to the consumer through the bank of collection nearest the consumer; that all transactions have been for cash; that the consumer has received the nitrate of soda only when it took up the shipping documents through the local bank of collection by paying the draft attached thereto for the purchase price of said nitrate of soda; that all funds received in payment have been remitted by the local bank to the Merchants National Bank of Mobile, Alabama, and immediately forwarded by that bank to the petitioner in New York City; that since October 10th, 1927, petitioner has not maintained any bank account in Alabama, all expenses incurred in Alabama being paid [fol. 14] from the New York office.

5. That on December 31st, 1929, the petitioner had no accounts or bills receivable in Alabama, and at no time has it had any of its money in Alabama, except during the brief interval while the funds in payment of the nitrate of soda were being transmitted from the local bank through the Merchants National Bank of Mobile, Alabama to your petitioner in New York City; that the only bills receivable that your petitioner has ever owned in the State of Alabama were owned on December 31st, 1927, in the amount of $7,-277.37, and then collected by the petitioner; that other than said nitrate of soda your petitioner has not since January 1st, 1928, owned any property in the State of Alabama; and it has not since — date employed any capital in the State of Alabama.

6. On March 14th, 1930, your petitioner filed with the Tax Commission of the State of Alabama a return and written statement under oath as required by Statute 58 of the Acts of the Legislature of Alabama of 1927 (page 177) on blanks furnished it by the State Tax Commission; that a correct copy of said return and written statement is attached hereto, marked "Exhibit A" and made a part of this petition; that on March 31st, 1930, the Tax Commission of the State of Alabama made a final assessment of a tax on the franchise of said corporation in an amount of $1,425.69; that a correct copy of said assessment made by said State Tax Commission, marked "Exhibit B" is attached to this petition and made a part hereof; that as a basis for said assessment, said State Tax Commission held said nitrate of soda of petitioner on hand in said warehouse in Mo-

bile, Alabama, on December 31st, 1929, as hereinabove described, to come within the meaning of the phrase "capital employed in this State", as used in the provisions of the Acts of the Legislature relating to the assessment of a franchise tax against foreign corporations (Acts of 1927, page 176, Section 54); that in fact said nitrate of soda imported by petitioner, as above described, was the sold basis for said final assessment against your petitioner by said State Tax Commission; that on the — day of April, 1930, the petitioner took an appeal from said final assessment to the Circuit Court of Montgomery County, sitting in Equity, by filing on that day with the Register of said Circuit Court due notice of appeal; and by also on said day filing said notice with the said State Tax Commission [fol. 15] (a correct copy of said notice is attached to this petition, marked "Exhibit C" and made a part hereof) and by duly filing with the Register of said Circuit Court a bond for said appeal as required by the laws of the State of Alabama; that a correct copy of said bond, marked "Exhibit D" is attached to this petition and made a part hereof; that said appeal is now pending in the Circuit Court of Montgomery County, In Equity, and that this petition is filed in furtherance of said appeal by your petitioner, who is the appellant, and for the purpose of vacating said final assessment.

The premises considered, your petitioner prays that the State of Alabama, respondent on this appeal, be required to defend against this appeal, and be required to answer the allegations of this petition from Paragraph 1 to Paragraph 6, inclusive; that upon final hearing of the pleadings and proof your Honors will order, adjudge and decree that the said final assessment made against your petitioner be vacated in its entirety, and your petitioner be released from all obligation to pay the same or any part thereof; that if your petitioner is in any wise mistaken in its above prayer for relief, that your Honors will grant to your petitioner any further and additional relief as may in equity and good conscience be due to your petitioner in the premises:

And your petitioner will ever pray, etc.,

Lange, Simpson & Brantley, Attorneys for the Petitioner.

Foot Note

The State of Alabama, respondent on this appeal, is required to answer each and every allegation of this petition, from Paragraphs 1 to 6, inclusive, but oath thereto is expressly waived.

Lange, Simpson & Brantley, Attorneys for the Petitioner.

[File endorsement omitted.]

[fol. 16] In Circuit Court of Montgomery County

Motion to Strike—Filed Oct. 22, 1931

Comes the State of Alabama by its attorneys, and moves to strike the petition herein filed, and for grounds of such motion says:

First. That there is no provision of law for the filing of such petition.

Second. That the proceeding is an appeal from the assessment made by the State Tax Commission against petitioner, and that the statute providing for such appeal makes no provision for such petition.

Third. That the transcript of the record of the State Tax Commission is the only matter which this Court can consider on this hearing, and that this petition is without authority of law.

Thomas E. Knight, Jr., Attorney General. Frontis H. Moore, Assistant Attorney General.

[File endorsement omitted.]

In Circuit Court of Montgomery County

Demurrer—Filed Oct. 22, 1931

Comes the State of Alabama, and demurs to the bill or petition filed herein, and for grounds of demurrer says:

First. There is no equity in the bill.

Second. That the bill with the exhibits thereto affirmatively show that the petitioner is liable for the tax assessed.

Third. That the bill and exhibits thereto affirmatively show that the petitioner was a foreign corporation which had qualified to do business in Alabama, that it was doing business in the State of Alabama on the 1st day of January, 1930, that it had property within the State to the amount show- in the bill or exhibits thereto, and that petitioner is thereby liable for the tax assessed by the State Tax Commission.

Fourth. That the petition with the exhibits thereto, shows on its face that petitioner had capital employed in the State of Alabama from January 1st, 1930, that the petitioner was a foreign corporation duly qualified to do business in the State of Alabama, and liable for the franchise tax assessed on such capital employed.

[fol. 17] Thomas E. Knight, Jr., Attorney General.
Frontis H. Moore, Assistant Attorney General.

[File endorsement omitted.]

In Circuit Court of Montgomery County

Answer—Filed Oct. 22, 1931

Comes the State of Alabama, and without waiving any motions, demurrers or objections heretofore filed, but insisting on same, answers the petition herein filed as follows:

First. It admits the allegations of paragraph one of said petition except that petition avers that petitioner was incorporated under the laws of the State of New York, October 31, 1927, whereas the exhibit shows that petitioner was organized under the laws of the State of New York, August 31, 1927.

Second. Petitioner neither admits nor denies the allegations contained in paragraphs two, three, four and five of said bill, but demands strict proof of same.

Third. Petitioner admits the allegations contained in paragraph six of said bill. The State of Alabama further answering said bill, avers that petitioner is a foreign corporation organized under the laws of the State of New York, which prior to January 1, 1930, had qualified to do business in the State of Alabama, and was so qualified on January 1, 1930; that on December 31st, 1929, the petitioner had nitrate in the City and County of Mobile, which is within the State of Alabama, to the amount of Seven Hundred and Twelve Thousand Eight Hundred and Forty-six dollars and seventy-two cents ($712,846.72) as shown by their franchise tax return made to the State Tax Commission; that the said Tax Commission considered the same as capital employed within the State of Alabama by a foreign corporation, and assessed the petitioner for franchise tax for the year 1930, and based on such capital employed imposed a tax of One Thousand Four Hundred and Twenty-five dollars and sixty-nine cents ($1,425.69) under the authority of Revenue Act approved July 22, 1927, being Acts [fol. 18] of the Legislature of 1927, p. 139, and for further answer the State of Alabama avers that this is not a tax on imports, but is a franchise tax for the privilege of doing business within the State of Alabama.

Wherefore respondent prays that this petition and appeal be dismissed, and a judgment here rendered holding petitioner liable for the amount of the tax assessed by the State Tax Commission, together with such costs and penalties as shall have accrued.

Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, (Attorneys for the State of Alabama).

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

ANGLO-CHILEAN NITRATE SALES CORPORATION

vs.

STATE OF ALABAMA

AGREED STATEMENT OF FACTS—Filed Oct. 22, 1931

It is agreed by and between the attorneys representing the Appellant in this cause and the attorneys representing

the State that the agreed statement of facts hereunto attached are admitted upon the following stipulations:

1. That the State objects to the admission of any evidence other than that shown by the record and transcript certified by the State Tax Commission.

2. That the State maintains that no other evidence can be introduced than that shown by the transcript and record of the State Tax Commission.

3. That the State maintains that this proceeding is merely a review of the judgment of the State Tax Commission and no other evidence is admissable than that shown by the record. It is further stipulated that should the Court overrule the foregoing objections of the State to the admission of [fol. 19] testimony other than that shown by the transcript of the record of the State Tax Commission then the agreed statement of facts hereto attached shall be admitted subject to all legal objections as to relevency, competency and admissibility.

This 21st day of September, 1931.

Lange, Simpson & Brantley, Attorney- for Anglo-Chilean Nitrate Sales Corporation. Thomas E. Knight, Jr., Attorney General. Frontis H. Moore, Assistant Attorney General.

Agreed Statement of Fact-

It is hereby agreed between the State of Alabama and Anglo-Chilean Nitrate Sales Corporation that the following is a true statement of facts covering the above case relating to the validity of a franchise tax levied against said corporation by the State Tax Commission on March 31, 1930; which statement of facts shall be taken to be the evidence in this cause:

Anglo-Chilean Nitrate Sales Corporation was organized under and by virtue of the Laws of the State of New York, and its certificate of incorporation was filed in the office of the Secretary of State of the State of New York on August 31, 1927. It qualified to do business in the State of Alabama on October 10, 1927. Between October 10, 1927, and March 31, 1930, the corporation was engaged in the business

of importing into the United States nitrate of soda from Chile, South America, through the Port of Mobile, Alabama, and other ports in the United States. That said corporation sold and delivered said nitrate of soda to customers both within and without the State of Alabama. That on December 31, 1929, said corporation had on hand 33,455,763 pounds of nitrate of soda, which had been imported by it into the United States from Chile, South America, and was stored in public warehouse in the City of Mobile, Alabama. That all of said nitrate of soda, when imported into the United States through the Port of Mobile, Alabama, was contained in bags, each bag containing approximately 100 pounds of nitrate of soda, and that said nitrate of soda was stored in a public worehouse in said original bags, and [fol. 20] subsequently sold and delivered by the corporation in the original bags in which the same was imported. That between the date of importation of said nitrate of soda into the United States through the Port of Mobile, Alabama, and its sale and delivery by the corporation, none of said nitrate of soda had been removed from the original bags in which it was imported, nor have the original bags at any time been broken into.

That since October 10th, 1927, the principal office of the corporation has been and is now at 120 Broadway, New York City, New York. That between October 10, 1927 and March 31, 1930 said corporation sold said nitrate of soda through a salesman in the State of Alabama, who was compensated by commissions on his sales and paid his own operating expenses. All orders taken by said salesman were taken subject to the approval of the New York office of said corporation, and no orders so taken were effective until signed and approved by the corporation in New York City. When any such orders were accepted and approved by the corporation in New York City, directions were then given by the home office to ship the nitrate of soda so ordered to the customer in the original bags in which the same was imported into the United States and stored in warehouse in Mobile, Alabama. Such directions were given by the New York office of the corporation to Walsh Stevedoring Company, Post Office Box 55, Mobile, Alabama, an entirely independent contractor, which had an arrangement with said corporation to handle the importation of said nitrate of soda for said corporation, store the same in a

public warehouse, and forward it to the particular customer after a sale thereof by the corporation.

All nitrate of soda that has been sold by the corporation and delivered by it from the warehouses in Mobile, Alabama, between October 10, 1927, and March 31, 1930, was packed in Chile, South America, shipped from Chile, and imported into the United States, through the Port of Mobile, Alabama, solely in the original bags.

Upon receipt from the New York office of said corporation of directions to ship nitrate of soda in pursuance of a sale, as hereinbefore described, said Walsh Stevedoring Company forwarded said nitrate of soda to the ultimate consumer, together with a bill of lading, the shipping documents being sent to the customer through the bank of collec- [fol. 21] tion nearest the customer. All transactions have been for cash. The consumer has received the nitrate of soda only when he took up the shipping documents through the local bank of collection by paying the draft attached thereto for the purchase price of said nitrate of soda. All funds received in payment have been remitted by the local bank to the Merchants National Bank of Mobile, Alabama, and immediately forwarded by that bank to the corporation at New York City.

Since October 10th, 1927, the corporation has not maintained any bank account in Alabama, all expenses incurred in Alabama being paid from the New York office.

On December 31, 1929 the corporation had no accounts or bills receivable in Alabama and at no time has it had any of its money in Alabama, except during the brief interval while the funds in payment of the nitrate of soda are being transmitted from the local bank through the Merchants National Bank of Mobile, Alabama. Other than nitrate of soda, the corporation has not owned or employed in the State of Alabama between October 10, 1927 and March 31, 1930 any property, and it has during said time employed no capital in the State of Alabama, except that on December 31, 1927 it had accounts or bills receivable of $7,277.37, or unless the importation into the United States through the Port of Mobile, Alabama, and the storage in Mobile, Alabama, and sale of said nitrate of soda in the manner hereinabove described be considered capital employed in the State of Alabama. (The question referred to as to whether this constitutes capital employed in the State

is, of course, a question reserved for the consideration of the Court, and no admissions are made by either party to this procedure on this question.)

On March 14th, 1930, the said corporation filed with the Tax Commission of the State of Alabama a return and written statement under oath, as required by Section 58 of the Acts of the Legislature of Alabama of 1927 (page 177) on blanks furnished it by the State Tax Commission. It is agreed that a copy of the statement and return so made and filed with the State Tax Commission be attached to this statement of facts and made an exhibit hereto. It is further agreed that on March 31, 1930, the Tax Commission of the State of Alabama made a final assessment of a tax on the franchise of the said corporation in an amount of [fol. 22] $1,425.69 for the year 1930. From this assessment the said corporation has appealed to the Circuit Court of Montgomery County, Alabama, sitting in Equity.

The State of Alabama, by Thomas E. Knight, Attorney General. Anglo-Chilean Nitrate Sales Corporation, a Corporation, by Lange, Simpson & Brantley, Its Attorneys.

[File endorsement omitted.]

In Circuit Court of Montgomery County

[Title omitted]

Order of Submission

This cause coming on to be heard is submitted for decree upon the pleadings and proof as noted by the Register. This November 27th, 1931.

Walter B. Jones, Circuit Judge.

In Circuit Court of Montgomery County

[Title omitted]

Note of Testimony—Filed Nov. 27, 1931

Appellant being called offers the following testimony, towit:

1st. Notice of appeal from final assessment by Anglo-Chilean Nitrate Sales Corporation.

2nd. Petition of Appellant.

3rd. Certified copy of records of State Tax Commission showing notice of appeal filed by appellant with State Tax Commission, the final assessment made by the State Tax Commission of the franchise tax of appellant corporation, written statement and return made by appellant Corporation to the State Tax Commission as required by Statute.

4th. Agreed statement of facts.

[fol. 23] Appellee being also called, offers the following testimony, towit:

1st. Motion to strike petition of appellant.

2nd. Demurrer to petition of appellant.

3rd. Answer to petition of appellant.

4th. Agreed statement of facts.

5th. Certified copy of records of State Tax Commission showing rate and assessment of franchise tax of Anglo-Chilean Nitrate Sales Corporation for year beginning January 1, 1930, etc.

I hereby certify that the above note of testimony is correct, this the 27th day of November, A. D. 1931.

John R. Matthews, Register.

[File endorsement omitted.]

In Circuit Court of Montgomery County

In Equity. No. 6313

Anglo-Chilean Nitrate Sales Corporation

vs.

State of Alabama

Decree—Filed Nov. 27, 1931

This is an appeal by the Anglo-Chilean Nitrate Sales Corporation, a foreign corporation organized under the laws of New York, from a final assessment made against

said corporation on March 31st, 1930, by the State Tax Commission; and the matter now comes on to be heard before the court upon the appeal from the said assessment, together with the petition of the appellant, the motion of the State to strike the petition, the demurrer of the State to the petition, and the answer of the State to the petition, and upon the agreed statement of facts and the testimony as noted by the register. And the same having been argued to the Court and now being understood by the Court, it is

Ordered, adjudged, and decreed by the Court:

(1) That the motion of the State to strike the petition filed herein on September 30, 1931, be and the same is hereby denied.

(2) That the demurrer of the State to the petition filed herein on September 30, 1931, be and the same is hereby overruled.

[fol. 24] (3) That the said final assessment made by the State Tax Commission of Alabama against the said Anglo-Chilean Nitrate Sales Corporation, on March 31, 1930, be and the same is hereby vacated and annulled.

(4) That the costs of this matter be and the same are hereby taxed against the State of Alabama.

Done at Montgomery, Alabama, this November 27th, 1931.

Walter B. Jones, Circuit Judge.

[File endorsement omitted.]

[fol. 25] In Circuit Court of Montgomery County

[Title omitted]

Notice of Appeal—Filed December 9, 1931

Comes the State of Alabama and hereby appeals to the Supreme Court of Alabama from the decree of the Circuit Court of Montgomery County, In Equity, in the above styled cause, rendered on November 27, 1931.

This the 8th day of December, 1931.

State of Alabama, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Its Attorneys

Citation, in usual form, showing service on Lange, Simpson & Brantley, omitted in printing.

[fol. 26] In Circuit Court of Montgomery County

[Title omitted]

Certificate of Appeal

I, John R. Matthews, Register of the Circuit Court of Montgomery County, Alabama, In Equity, do hereby certify that an appeal was taken in the above stated cause on the 9th day of December, 1931, by the defendant, State of Alabama, from a decree in said cause on the 27th day of November, 1931, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the present term of said Supreme Court.

Given under my hand and seal of office, this the 10th day of December, 1931.

John R. Matthews, Register of the Circuit Court of Montgomery County, in Equity. (Seal.)

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 28] In Supreme Court of Alabama

State of Alabama

vs.

Anglo-Chilean Nitrate Sales Corporation

Agreement as to Exhibits

It is stipulated and agreed between the parties in the above styled cause that no question shall be raised by virtue of the failure to include in the record as exhibits to the petition filed by the Appellee (page 12 of Transcript), the exhibits described therein, to wit: Exhibit A being a copy of the franchise tax return made by the corporation; Exhibit B

being a copy of the final assessment made by the Tax Commission; Exhibit C being copy of notice of appeal filed with the Register of the Circuit Court, and with the State Tax Commission; and Exhibit D being a copy of bond filed with the Register of the Circuit Court.

It is further stipulated and agreed that said Exhibits may be considered by the Court as fully as if same were shown in the record and attached to said petition shown on record, page 12, said Exhibits fully appearing otherwise in the record on pages 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the record.

It is further stipulated and agreed that these Exhibits are added to complete the petition and that the objections to the petition in its entirety made by the State are in no wise affected by the addition of these Exhibits.

This 12 day of January, 1932.

State of Alabama, by Thomas E. Knight, Jr., Attorney General. Frontis H. Moore, Assistant Attorney General. Anglo-Chilean Nitrate Sales Corporation, by Lange, Simpson & Brantley, by R. B. Barnes, Its Attorney.

[fol. 29] IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENTS OF ERROR

Comes the State of Alabama, appellant in the above styled cause and assigns the following errors appearing in the transcript of the record of the court below, and for grounds thereof says:

1. That the Court below erred in denying the motion of the State to strike the petition filed by the corporation in the Court below. Tr. pp. 12, 16 and 23.

2. That the Court below erred in overruling the demurrers of the State to such petition. Tr. pp. 12, 16 and 23.

3. That the Court below erred in overruling the State's objection to the admission of any evidence other than the record and transcript certified by the State Tax Commission. Tr. p. 18.

4. That the Court below erred in the admission of anything other than the transcript of the record of the State Tax Commission as certified by the State Tax Commission.

5. That the Court below erred in and by its final decree in vacating and annulling the final assessment made by the State Tax Commission against the Anglo-Chilean Nitrate Sales Corporation on March 31, 1930. Tr. p. 24.

6. That the Court below erred in and by its final decree in vacating and annulling the final assessment made by the State Tax Commission against the Anglo-Chilean Nitrate Sales Corporation from which appeal was prosecuted by the corporation, and in not sustaining such final assessment. Tr. p. 24.

This Jan. 12, 1932.

State of Alabama, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Its Attorneys.

To Anglo-Chilean Nitrate Sales Corporation or Lange, Simpson and Brantley and R. B. Barnes, its atrorneys of record:

You will take notice of the foregoing assignment of errors.

This Jan. 12, 1932.

State of Alabama, by Thomas E. Knight, Jr., Attorney General. Frontis H. Moore, Asst. Attorney General.

[fol. 30] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF SUBMISSION—Jan. 14, 1932

Come the parties, by attorneys, and submit this cause on briefs for decision.

IN SUPREME COURT OF ALABAMA

STATE OF ALABAMA

vs.

ANGLO-CHILEAN NITRATE SALES CORP.

JUDGMENT—May 12, 1932

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the decree of the Circuit Court be reversed and annulled and the cause remanded to said Court with directions for a decree in accord with the views expressed in the opinion of this Court in said cause. It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 31] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1931-32

In Equity. 3 Div., 996

STATE OF ALABAMA

v.

ANGLO-CHILEAN NITRATE SALES CORPORATION

Appeal from Montgomery Circuit Court

OPINION—May 12, 1932

GARDNER, J.:

The appeal is by the State from the decree of the equity court overturning the final assessment of a franchise tax of the Anglo-Chilean Nitrate Sales Corporation, a foreign corporation, for the year 1930, entered by the Tax Commission of this State. The assessment was based upon the valuation of the capital employed within the State, as au-

thorized by our statute passed in obedience to the mandate of our Constitution. Gen. Acts 1927, p. 176; Section 232, Constitution of Alabama; L. & N. R. R. Co. v. State, 201 Ala. 317, 78 So. 93; Ellis v. Handley, 214 Ala. 539, 108 So. 343; Kansas City M. & B. R. R. Co. v. Stiles, 182 Ala. 138; L. & N. R. R. Co. v. State, 39 S. Ct. Rep. 18.

[fol. 32] The cause was tried in the court below upon an agreed statement of facts which will appear in the report of the case.

The corporation defended upon the theory, evidently accepted by the chancellor, that the basis of the assessment was the valuation of the nitrate imported from Chile, stored in a public warehouse in Mobile, Alabama, in the original packages or sacks of one hundred pounds each and as such constituted imports, immune from State taxation under the provisions of our Federal Constitution, Article 1, section 10, clause 2, as construed in Brown v. Maryland, 6 Law. Ed. 678; Cook v. Pa., 24 Law. Ed. 1015; May v. New Orleans, 44 Law. Ed. 1165.

The defendant duly qualified as a foreign corporation to do business in this State, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the State appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constitued its business, was immune from State taxation.

But we think the argument stresses too far the inhibition against State taxation of imports found in our Federal Constitution and overlooks the nature of the tax here in question. The Federal Constitution, in the respect here pertinent, is that "no state shall without the consent of the Congress lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." The franchise tax here imposed applies [fol. 33] alike to all foreign corporations engaged in business in this State. It makes no reference to imports which are here involved solely because of the business in which the corporation was engaged. The following familiar general principle of law is not questioned:

"It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may im-

pose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State." New York State v. Roberts, 171 U. S. 658.

And in Hern Silver Mining Co. v. New York, 143 U. S. 305, the opinion quotes from the early case of Paul v. Virginia, 8 Wall. 168, as follows:

"Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And, after stating that this doctrine is settled by the decisions and may be considered at rest, the opinion proceeds:

[fol. 34] "Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank of Augusta v. Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 12. The other limitation on the power of the state is, where the corporation is in the employ of the general government. * * * Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."

It has also become equally as well settled that an excise tax may properly be measured by tax immune property. In discussing this question the court in Home Ins. Co. v. New York, 134 U. S. 594, used the following expressions:

"The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. * * * From the very nature of the tax, being laid upon a franchise given by the state, and removable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested."

[fol. 35] This principle was fully recognized and given application in the recent case of Educational Films Corporation v. Ward, 51 Sup. Ct. Rep. 170. There the corporation challenged the franchise tax assessed against it so far as it was measured by the amount of royalties received from copyrights which were immune from state taxation. The court denying relief, considered the question answered in Flint v. Stone Tracy Co., 220 U. S. 107, where was reaffirmed the distinction, repeatedly made, between a tax, invalid because laid directly on governmental instrumentalities or income derived therefrom, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income, and numerous illustrations from the adjudicated cases are noted, among them those holding a state inheritance tax valid, although measured by the value of United States bonds which are transmitted (Plummer v. Coles, 178 U. S. 115); a tax on net income, though receipts from exports are included in the compilation (Peck v. Lowe, 247 U. S. 165); the inclusion in a state income tax of receipts from interstate commerce, held not a prohibited burden on such commerce.—United States Glue Co. v. Oak Creek, 247 U. S. 321. Further illustrative is Kansas City F. S. & M. R. Co. v. Botkin, 240 U. S. 227, where

it is held that, though a state may not tax tangible property located beyond its boundaries (Refrigerator Transit Co. v. Kentucky, 199 U. S. 194), yet it may measure a tax on franchises of domestic corporations by corporate property, even though without the state.

[fol. 36] And, after observing that the franchise statute there in question could have no application independently of the corporation's enjoyment of the privilege of exercising its franchise, the tax obviously was not exclusively a tax on income apart from the franchise, the court in the Ward case, supra, made the following observations which we consider as having some bearing upon the instant case:

"Under the Constitution the privilege of exercising the corporate franchise is the legitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 524, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Dobbins v. Commissioners of Erie County, 16 Pet. 435, 10 L. Ed. 1022; Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. Ed. 901; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 36 St. Ct. 453, 60 L. Ed. 779; Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703, 29 A. L. R. 1, it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of tax, may chance to include the obligations of the other, or the income derived from them.

The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other. * * *

[fol. 37] "It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other nondiscriminatory method.

"This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional systems, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other. * * *

"Having in mind the end sought, we cannot say that the rule applied by this Court for some seventy years, that a nondiscriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it, has failed of its purpose, or has worked so badly as to require a departure from it now, or that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule." [fol. 38] The cases relied upon by appellee (Ozark Pipe Corporation v. Monier, U. S. Supreme Court, 69 Law Ed. 439; Postal Telegraph Co. v. Adams, 155 U. S. 688; Western Union Tel. Co. v. Kansas, 216 U. S. 1; Galveston H. & S. A. R. Co. v. Texas, 52 Law Ed. 1031) involved the

question of undue burden upon interstate commerce, immunity of which from state interference has been zealously guarded by our federal decisions (Western Union Tel. Co. v. Kansas, supra), and concerning which the court has expressed difficulty in prescribing a satisfactory rule, and as to which a distinction has also been made between corporations organized to carry on interstate commerce, and having a quasi public character, and corporations organized to conduct strictly private business.—New York v. Roberts, supra.

The Roberts case, supra, had to deal also with the matter of imports and these observations were evidently intended in answer to argument rested upon the intertsate commerce cases cited in the opinion. In that case the basis for the franchise tax imposed by the state of New York bore relation to the amount of capital stock of the Michigan corporation within New York. The comptroller of New York, in fixing the amount of capital so employed, included a large sum as representing the value of imported crude drugs. The corporation sought a correction of the comptroller's assessment by reducing the amount to only its leasehold of the warehouse in that state. Discussing the matter of imports, here pertinent, the court said:

"Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the state under the doctrine of Brown v. Maryland, 12 Wheat. 419.

[fol. 39] "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

We consider this language here much in point, particularly when it is considered that the corporation there only sought a reduction of the assessment upon the theory the imports were immune from state taxation. The distinction

between that case and this appears to be one of degree and not of kind.

The statute here under review has no reference to imports, but is merely of a general character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this State. The matter of imports is entirely incidental, only indirectly and remotely affected by reason of the business conducted.

Nor do we consider the fact that in the Roberts case, supra, it appeared there was employed in New York a continuing capital used in the purchase of crude drugs, is a matter sufficient upon which to constitute any material distinction between that and the instant case. True, it here appears the corporation kept no bank account in Alabama. But it had a designated agent and sold its nitrate through a salesman in Alabama, the sales being to customers both within and without the State, and shipped [fol. 40] through its agency to such customers from the warehouse located in Alabama.

We attach no significance to the requirement that orders must first be approved in the New York office; nor to the fact that when shipment was made it was with bill of lading and shipping instructions through the bank nearest the customer, the sale being for cash and the proceeds forwarded by such local bank to the Merchants National Bank in Mobile, and by that bank at once forwarded to the corporation in New York. These details go to show the corporation was actually engaged in business in this State, and enjoying the protection of its laws, and the mere fact that the proceeds of the business did not linger on deposit in this State, but were forwarded to the New York office does not serve as a point of material differentiation in this case and that of the Roberts case, supra.

It is argued that the right to import carries with it also the right to sell (Brown v. Maryland, supra) in the original packages, and that the basis of measurement being the capital employed results in an imposition of a duty or tax upon such imports. The nitrate is shown to have been imported from Chile in one hundred pound sacks, and that is the form in which it was sold. We are not prepared to concede that the doctrine of "original package" cases would be extended to embrace importation of goods as to

which the method of shipment was likewise the method of sale; and we interpret some of the reasoning of the opinion in Fay v. New Orleans, supra, as tending to this [fol. 41] view. Certainly such an interpretation of the Constitution would at least have a tendency to encourage merchants and traders seeking to avoid state and local taxation, to import from abroad their merchandise in original salable packages.

But this question aside, and undetermined, we think the argument overlooks the nature of the tax here imposed, fully discussed in Flint v. Stone Tracy Co., supra, wherein it is noted that the tax is an excise upon the particular privilege of doing business in a corporate capacity, and with the advantages derived therefrom, the court saying:

"In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals."

[fol. 42] We think the authorities cited demonstrate there is no objection to the basis of measurement of the tax. Indeed argument to the contrary would be to argue the invalidity of our constitutional provision to that end, which has been approved here as well as in the federal courts.—Louisville and Nashville R. R. Co. v. State, supra. And clearly the corporation in the instant case has no just cause of complaint as to the basis of the measurement of the tax.

The Tax Commission based the assessment upon the value of the nitrate on hand and in storage in Alabama on December 31, 1929, amounting in value to $712,846.72, with nitrate on hand outside of Alabama of the value of five million dollars. The amount in storage on that particular date is merely taken as a fair estimate of the capital actually employed, but the amount actually sold in this State is not made to appear. The amount of sales may have been many times the above stated amount, but if there remained on hand only the nitrate of the value of $712,846.72, on December 31, 1929, the tax is to be so measured by that sum and not otherwise. These observations are merely to the point no unjust measurement is shown to have been applied, and to demonstrate that in fact the tax is not affected by the volume of business done in Alabama.

The cases disclose that in consideration of such character of taxation as here involved, the court looks to a practical rather than a logical or philosophical distinction, and the whole scheme of taxation is to be taken into account. "Regulation and commerce among the states both are practical rather than technical conceptions, and naturally their limits must be fixed by practical lines. * * * A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can".—Galveston H. & S. A. R. Co. v. Texas, supra.

[fol. 43] As we read the cases consideration is proper to be given the evident purpose or object of the statute or its inevitable effect. In Educational Films Corporation v. Ward, supra, discussing this question, the court quoted from Maccallen Co. v. Massachusetts, 279 U. S. 631, the following excerpts: "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them," and then proceeded to state: "It cannot be said that the present tax was aimed at copyrights."

And in Kansas City M. & B. R. R. Co. v. Stiles, 37 S. Ct. Rep. 58, the court in discussing the insistence that the franchise tax imposed a burden upon interstate commerce, said:

"So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases * * * is the nature and character of the tax imposed. The state may not regulate interstate commerce or impose burden upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce. We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the state to impose."

Certainly, if the courts are to be influenced upon such a consideration, then clearly there is nothing in the instant case to in the least indicate any purpose to in any manner interfere with imports or foreign commerce. These are [fol. 44] matters only incidentally and indirectly affected. The end sought by the decisions was the preservation to each government, both the federal and the state, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference the one by the other.—Educational Films Corporation v. Ward, supra.

Bearing in mind, therefore, the purpose to be attained by the adjudicated cases and considering the statute here involved, we are persuaded the State was properly within its sphere in demanding the franchise tax of the defendant corporation, and that such a tax in no manner violates any of its rights under the Federal Constitution, or tends to infringe upon the domain of the federal government.

We are therefore persuaded the chancellor incorrectly ruled in overturning the Tax Commission's assessment.

The decree will be reversed and the cause remanded to the court below for decree in accord with the views herein expressed.

Reversed and remanded.

Anderson, C. J., Bouldin and Foster, JJ., concur.

[fol. 45] IN SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING BY APPELLEE—Filed May 27, 1932

The appellee respectfully presents this its application for a rehearing in the above cause on which on May 12, 1932, an opinion and judgment were rendered by this Court reversing and remanding the decree theretofore rendered in the Circuit Court of Montgomery County, in Equity. Although appellee's brief in this cause was not filed within fifteen days after submission of the cause, this appeal was submitted by agreement between appellant and appellee with the understanding that appellee could not file its brief within the time specified and that the appellant would not resist a consideration by this court of an application for rehearing on that ground.

The appellee and applicant respectfully submits that this appeal involves questions which include within their scope the violation or non-violation of the Federal Constitution. The issues in this case are fraught not only with important consequences to this particular corporation, the appellee, but also to others who come within the bounds of the state for the purpose of engaging in local, foreign, or interstate commerce. Not only that, but a construction of the corporation franchise tax statutes as is called for in this case will necessarily have a far-reaching effect upon the public policy of the State.

In view therefore of what has been said above and in view further of the fact that a failure by this Honorable Court to consider this application on the technical ground that appellee has not as a matter of right the privilege of filing same, not having filed brief within the designated [fol. 46] fifteen days, might raise a serious procedural difficulty in the path of taking an appeal to the Federal Supreme Court by writ of error or other method we respectfully petition this Court to give this application a consideration on the merits. In support of the application appellee herewith submits the following brief and argument.

* * * * * * *

(Signed) Lange, Simpson & Brantley, Lange, Simpson & Brantley, Attorneys for Appellee.

I, Reid B. Barnes, one of the attorneys for the Appellee and Appellant, hereby certify that I have served a copy of the foregoing application and brief on Honorable Frontis H. Moore, Assistant Attorney General, Attorney for Appellant, before the filing of this application.

(Signed) Reid B. Barnes, Attorney for Apellee.

[File endorsement omitted.]

[fol. 47] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—June 9, 1932

The application for rehearing heretofore filed in this cause being duly examined and understood by the Court, it is considered and ordered that said application for rehearing be and the same is hereby overruled.

[fol. 48] IN SUPREME COURT OF ALABAMA

[Title omitted]

PRÆCIPE

Mr. Clerk:

Please incorporate the following portions of the record in the transcript on the appeal to the Supreme Court of the United States heretofore prayed by Anglo-Chilean Nitrate Sales Corporation, Appellee, from the final decision in this suit:

1. This præcipe.

2. Transcript of record from the Circuit Court of Montgomery County, pages No. 1 to 26, inclusive, together with certificate of record of the Register of the Circuit Court of Montgomery County, Alabama, and together with the assignment of errors of said State of Alabama (appellant in Supreme Court of Alabama).

3. The agreement in writing executed between the appellant and the appellee through their counsel of record on the 12th day of January, 1932, with reference to the exhibits to

the Petition of the Appellee in the Circuit Court of Montgomery County, Alabama; which agreement provides in substance that certain exhibits described in the petition being omitted at the end thereof, the same shall be considered as being incorporated in the proper place in the record.

4. The opinion of the Supreme Court of Alabama.

5. Order entered May 12, 1932, by the Supreme Court of Alabama, reversing the decree of the Circuit Court of Montgomery County, Alabama.

[fol. 49] 6. Application for re-hearing by appellee.

7. Order entered June 9th, 1932, by the Supreme Court of Alabama, denying application for re-hearing.

8. Petition for appeal.

9. Assignment of errors.

10. Order allowing appeal.

11. Citation.

(Signed) Root, Clark & Buckner, Lange, Simpson & Brantley, Attorneys for Anglo-Chilean Nitrate Sales Corporation, Appellee.

Service of copy of the foregoing præcipe acknowledged this 25 day of August, 1932.

(Signed) Frontis H. Moore, Assistant Attorney General of the State of Alabama, Attorney for the State of Alabama.

[fol. 50] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR APPEAL TO SUPREME COURT OF THE UNITED STATES

Considering itself aggrieved by the decision made by the Supreme Court of the State of Alabama in the above entitled cause on May 12, 1932, reversing a decree of the Circuit Court of Montgomery County, and by an order made herein by said Supreme Court on June 9, 1932, denying an application for rehearing, by which said decision became final, Anglo-Chilean Nitrate Sales Corporation, a corporation, the appellee above named, hereby prays that an ap-

peal by this appellee be allowed therefrom to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

For the errors assigned by appellee in its assignment of errors, presented herewith, the appellee above named, Anglo-Chilean Nitrate Sales Corporation, prays that the said final decision of the Supreme Court of the State of Alabama be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of the appellee, and for costs.

(Signed) Root, Clark & Buckner, Lange, Simpson & Brantley, Attorneys for Appellee, Anglo-Chilean Nitrate Sales Corporation.

[fol. 51] IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Anglo-Chilean Nitrate Sales Corporation, appellee herein, and in connection with its petition for appeal to the Supreme Court of the United States, makes and files this assignment of errors herein, to-wit, that the Supreme Court of the State of Alabama erred:

1. In reversing the decree of the Circuit Court of Montgomery County of the State of Alabama.

2. In holding that the statute of the State of Alabama, to-wit, Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against the appellee, is not void as in violation of clause 2 of section 10 of Article I of the Constitution of the United States.

3. In holding that the aforesaid statute of the State of Alabama, under which the tax involved in this suit was assessed against the appellee, is not void as in violation of that part of section 8 of Article I of the Constitution of the United States which empowers Congress to regulate foreign commerce.

[fol. 52] 4. In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not a tax on goods imported by the appellee from a foreign country and maintained in Alabama in the original package, and therefore not in violation of clause 2 of section 10 of Article I of the Constitution of the United States.

5. In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not in violation of clause 2 of section 10 of Article I of the Constitution of the United States, in that it levies a tax upon the right of appellee to sell in the original package goods imported by it from a foreign country, and measures the tax by the amount of property of the appellee in the state, which property consists solely of nitrate of soda imported by appellee from Chile, S. A., and held by it in the original package.

6. In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of section 8 of Article I of the Constitution of the United States, in that it levies a tax on the right of appellee to carry on foreign commerce in the State of Alabama, and measures such tax by the amount of property of the appellee in the state, which property consists solely of nitrate of soda imported by appellee from Chile, S. A., and held by it in the original package.

7. In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not in violation of Clause 2 of Section 10 of Article I of the Constitution of the United States, in that it levies a corporate franchise tax upon appellee corporation for the privilege of engaging exclusively in the business of selling in the original packages goods imported by it from a foreign country.

[fol. 53] 8. In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of Section 8 of Article I of the Constitution of the United States, in that it levies a corporate franchise tax on the appellee cor-

poration for the privilege of engaging exclusively in foreign commerce in the State of Alabama.

(Signed) Root, Clark & Buckner, Lange, Simpson & Brantley, Attorneys for Appellee, Anglo-Chilean Nitrate Sales Corporation.

[fol. 54] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER ALLOWING APPEAL

On this 25 day of August, 1932, on reading the petition for appeal in this cause to the Supreme Court of the United States from the decision entered in the above entitled suit in this court on May 12th, 1932, and from the order entered in the above entitled suit on June 9, 1932, denying an application for a rehearing, and on reading the assignment of errors filed by appellee, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided,

It is ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States from the Supreme Court of the State of Alabama in the above entitled cause, as provided by law; and

It is further ordered that the Clerk of the Supreme Court of the State of Alabama shall prepare and certify a transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date; and

It is further ordered that security for costs on appeal be fixed in the sum of $750.00, and the appellee Anglo-Chilean Nitrate Sales Corporation having presented an undertaking in the sum of $750.00, executed by itself as principal and United States Fidelity and Guaranty Company, as surety, it is now ordered that such undertaking be and the same is hereby approved; and

[fol. 55] Whereas, the appellee Anglo-Chilean Nitrate Sales Corporation has already given a bond with good and sufficient surety, conditioned to pay such judgment as may be rendered against it in the Circuit Court of Montgomery County, Alabama,

It is further ordered that the appeal herein shall operate as a supersedeas.

Done this 25 day of August, 1932.

(Signed) Jno. C. Anderson, Chief Justice of the Supreme Court of Alabama.

[fol. 56] Citation, in usual form, showing service on Frontis H. Moore, omitted in printing.

[fols. 57 & 58] Bond on appeal for $750.00, approved August 25, 1932, omitted in printing.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 60] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation to Print Entire Record—Filed Sept. 28, 1932

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The statute of the State of Alabama, to-wit: Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against the appellant, as construed by the Supreme Court of Alabama in this case, is unconstitutional and void as repugnant to Clause 2 of Section 10 of Article I of the Constitution of the United States, in that it (a) levies a tax on goods imported by the appellant from a foreign country and maintained in Alabama in the original package; (b) levies a tax upon the right of appellant to sell in the original package goods imported by it from a foreign country, and measures the tax by the amount of property of the appellant in the State of Alabama, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (c) levies a corporate franchise tax upon the appellant for the privilege of engaging exclusively in the business of selling in the

[fols. 61 & 62] original package goods imported by it from a foreign country.

Point 2. The aforesaid statute of the State of Alabama, under which the tax involved in this suit was assessed against the appellant, as construed by the Supreme Court of Alabama in this case, is unconstitutional and void as repugnant to Section 8 of Article I of the Constitution of the United States, in that it (a) levies a tax upon the right of appellant to carry on foreign commerce in the State of Alabama, and measures such tax by the amount of property of the appellant in the State, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (b) levies a corporate franchise tax upon the appellant for the privilege of engaging exclusively in foreign commerce in the State of Alabama.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of the case, except the bond and citation upon this appeal.

Dated September 16, 1932.

Elihu Root, Jr., Counsel for Appellant.

The undersigned, attorney of record for the appellee herein, hereby acknowledges due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed, and agrees that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waives all right to file a counter-designation of parts of the record to be printed.

Dated September 23rd, 1932.

Frontis H. Moore, Assistant Attorney-General of the State of Alabama, Counsel for Appellee.

[fol. 63] [File endorsement omitted.]

Endorsed on cover: File No. 37,074. Alabama Supreme Court. Term No. 377. Anglo-Chilean Nitrate Sales Corporation, appellant, vs. The State of Alabama. Filed September 19, 1932. File No. 37,074.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 377.

ANGLO-CHILEAN NITRATE SALES CORPORATION,
Appellant,

vs.

STATE OF ALABAMA,
Appellee.

JURISDICTIONAL STATEMENT.

Comes now the appellant herein, Anglo-Chilean Nitrate Sales Corporation, a corporation organized and existing under the laws of the State of New York, and, in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, presents the following statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Alabama in this case.

(a) The jurisdiction of the Supreme Court of the United States to entertain an appeal in this case is conferred by Section 237 (a) of the Judicial Code of the United States, as amended, (28 U. S. C. A., §344 [a]), and Section 1 of the Act of Congress of January 31, 1928, (c. 14, 45 Stat. 54), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree

in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of the statute.

(b) The decision of the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision in this case could be had, sought to be reviewed is a judgment entered the 12th day of May, 1932 (Record, page 30), reversing a decree of the Circuit Court of Montgomery County, State of Alabama, in equity, and an order entered by the Supreme Court of Alabama on the 9th day of June, 1932 (Record, page 47), overruling an application for a rehearing in said cause. The application for an appeal to this Court in this case was presented to the Chief Justice of the Supreme Court of Alabama on the 25th day of August, 1932 (Record, page 50), and an appeal was allowed by an order signed by said Chief Justice of the Supreme Court of Alabama on the same day (Record, pages 54-55).

(c) For a statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of the appeal sought, the appellant, Anglo-Chilean Nitrate Sales Corporation, respectfully shows:

This case was begun by appellant by means of an appeal to the Circuit Court of Montgomery County of the State of Alabama, in equity, from a final assessment of a franchise tax made by the State Tax Commission of Alabama against appellant on the 31st day of March, 1930, in the amount of $1,425.69 (Record, pages 12-15), which said assessment, under the laws of the State of Alabama, had the force and effect of a judgment against appellant. In connection with

such appeal to the Circuit Court of Montgomery County, appellant gave bond, with good and sufficient surety, in double the amount of said final assessment made by the State Tax Commission, which bond was conditioned to pay such judgment as might be rendered against the appellant in the Circuit Court of Montgomery County (Record, pages 3-4).

The tax in question was assessed against appellant under the provisions of Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, which provides in part as follows:

> "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this State."

The petition of appellant on the appeal to the Circuit Court of Montgomery County showed that during the tax year appellant was engaged in Alabama in the business of selling nitrate of soda imported by the appellant into the United States from Chile, South America, all of which nitrate was sold by appellant in the original package, and that the only property held by the appellant in the State of Alabama during the tax year consisted of such nitrate of soda imported by appellant from Chile, South America, and stored by it in the original package (Record, page 12).

In the Circuit Court of Montgomery County, the appellant contended that the above mentioned statute of the State of Alabama, if construed to impose upon appellant the tax assessed by the State Tax Commission, was invalid

as in violation of Clause 2 of Section 10 of Article I of the Constitution of the United States, and as in violation of Section 8 of Article I of the Constitution of the United States.

On the 27th day of November, 1931, the Circuit Court of Montgomery County, in the State of Alabama, entered a decree adjudging, *inter alia,* that the said final assessment made by the State Tax Commission of Alabama against the appellant be vacated and annulled (Record, pages 23-24).

The State of Alabama thereupon appealed to the Supreme Court of Alabama from the above mentioned decree of the Circuit Court of Montgomery County (Record, page 25). On such appeal, the appellant again contended that the above mentioned statute of the State of Alabama, if construed to levy against appellant the tax assessed by the State Tax Commission, was invalid as in violation of Clause 2 of Section 10 of Article I of the Constitution of the United States and as in violation of Section 8 of Article I of the Constitution of the United States.

On the 12th day of May, 1932, the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision in this case could be had, entered a judgment reversing the decree of the Circuit Court of Montgomery County and remanding the cause to such Circuit Court for a decree upholding the validity of the assessment made by the State Tax Commission (Record, page 30). The opinion of the Supreme Court of Alabama dealt with the Federal constitutional objections raised by the appellant, and overruled them (Record, pages 31-44). The opinion of the Supreme Court of Alabama has not yet been officially reported but is unofficially reported in *State* v. *Anglo-Chilean Nitrate Sales Corporation,* 142 So. Rep. 87.

On the 27th day of May, 1932, the appellant made an application for a rehearing to the Supreme Court of Alabama (Record, pages 45-46). This application was overruled without opinion on the 9th day of June, 1932 (Record, page 47).

(d) The cases believed by appellant to sustain the jurisdiction of the Supreme Court of the United States and which show that this case is one in which, under the legislation in force when the aforesaid Act of Congress of January 31, 1928, was passed, to wit, under Section 237 (a) of the Judicial Code of the United States, a review could be had in the Supreme Court of the United States on writ of error as a matter of right, are *Western Turf Association* v. *Greenberg,* 204 U. S. 359 (1907); *Dahnke-Walker Milling Company* v. *Bondurant,* 257 U. S. 282 (1921); *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203 (1925). In each of these cases, as in the present case, there was drawn in question the validity of a statute of a State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. See also: *Miedreich* v. *Lauenstein,* 232 U. S. 236, 243 (1914); *Cissna* v. *Tennessee,* 246 U. S. 289 (1918).

ELIHU ROOT, JR.,
Counsel for Appellant.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 377

ANGLO-CHILEAN NITRATE SALES CORPORATION,
Appellant,

against

THE STATE OF ALABAMA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE APPELLANT

R. WORTH VAUGHAN,
Counsel for Appellant.

ELIHU ROOT, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 377

ANGLO-CHILEAN NITRATE SALES CORPORATION,

Appellant,

against

THE STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE APPELLANT

This case comes before the Court on appeal from the Supreme Court of Alabama under Section 237 (a) of the Judicial Code of the United States, as amended (28 U. S. C. A. §344 [a]), and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), and involves a suit begun by appellant in the Circuit Court of Montgomery County, Alabama, in equity, to vacate a final assessment of a franchise tax made by the State Tax Commission of Alabama against the appellant for the year 1930. This Court, on November 21, 1932, noted probable jurisdiction.

Opinion Below

Supreme Court of Alabama, 142 Southern Reporter 87 (R. 26-36), not yet officially reported.

The Circuit Court of Montgomery County, Alabama, vacated the assessment (R. 21-22). The Supreme Court of Alabama reversed the decree of the Circuit Court of Montgomery County and directed a decree upholding the assessment (R. 26). An application for a rehearing was overruled (R. 38).

Question Presented

Is Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against the appellant, as construed by the Supreme Court of Alabama in this case, unconstitutional and void as repugnant to Clause 2 of Section 10 of Article I and/or Section 8 of Article I of the Constitution of the United States?

The Statute Involved

Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, provides as follows:

> "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this state under this section, there shall be deducted from the amount of the capital employed by such corporation in this state the aggregate amount of loans of money made by such corporations in this

state, and which shall be secured by existing mortgage or mortgages to it on real estate in this state, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

Statement of Facts

The case was tried in the courts below upon an agreed statement of facts which appears at pages 16 to 20 of the record. These facts may be summarized as follows:

The appellant, Anglo-Chilean Nitrate Sales Corporation, is a New York corporation, having its principal office in the City of New York. It qualified to do business in the State of Alabama on October 10, 1927. Between that date and March 31, 1930 (the date on which the final assessment in question was made) appellant was engaged in the business of importing into the United States nitrate of soda from Chile, South America, through the Port of Mobile, Alabama, and other ports in the United States. Appellant sold and delivered such nitrate to customers both within and without the State of Alabama.

On December 31, 1929 (the date as of which the return was made) appellant had on hand 33,455,763 pounds of nitrate which had been imported by it into the United States from Chile and was stored in a public warehouse in the City of Mobile, Alabama. All of such nitrate, when imported into the United States through the Port of Mobile, was contained in bags, each bag containing approximately 100 pounds of nitrate. Such nitrate was stored in a public warehouse in such original bags and subsequently sold and delivered by appellant in the original bags in which it was imported. Between the date of importation and its sale and delivery by appellant, none of the nitrate had been re-

moved from the original bags, nor had the original bags at any time been broken into.

The nitrate was sold through a salesman in the State of Alabama who was compensated by commissions on his sales, and who paid his own operating expenses. All orders taken were subject to the approval of appellant's New York office, and no orders were effective until signed and approved by appellant in New York City. When such orders were accepted and approved, directions were then given by the home office to ship the nitrate to the customer in the original bags in which it was imported into the United States and stored in warehouse. Such directions were given to Walsh Stevedoring Company, Mobile, Alabama, an entirely independent contractor, which had an arrangement with appellant to handle the importation of the nitrate, store it in a public warehouse and forward it to the particular customer after a sale had been made by appellant.

All nitrate sold by appellant and delivered by it from the warehouse in Mobile, Alabama, between October 10, 1927 and March 31, 1930, was packed in Chile, shipped from Chile, and imported into the United States through the Port of Mobile, solely in the original bags.

Upon receipt from appellant's New York office of directions to ship nitrate in pursuance of a sale, the Walsh Stevedoring Company forwarded such nitrate to the ultimate consumer together with the bill of lading, the shipping documents being sent to the customer through the bank of collection nearest the customer. All transactions were for cash. The customer received the nitrate only when he took up the shipping documents through the local bank of collection by paying the draft for the purchase

price attached thereto. All funds received in payment were remitted by the local bank to the Merchants National Bank of Mobile, Alabama, and immediately forwarded by that Bank to appellant at New York City. Appellant maintained no bank account in Alabama, all expenses incurred in Alabama being paid from the New York office.

On December 31, 1929, appellant had no accounts or bills receivable in Alabama except during the brief interval while the funds in payment of the nitrate were being transmitted from the local bank through the Merchants National Bank of Mobile, Alabama. Other than nitrate, appellant did not own or employ any property in the State of Alabama and employed no capital in the State, unless the importation into the United States through the Port of Mobile, the storage in Mobile and the sale of the nitrate in the manner above described be considered capital employed in the State.

On March 14, 1930, appellant filed with the Tax Commission of the State of Alabama a return and written statement under oath as required by Section 58 of Act No. 163, Alabama General Acts, 1927, page 177, on blanks furnished by the State Tax Commission. In the return (R. 8) appeared the following:

> "18. Book value of property, both tangible and intangible, in Alabama not assessed for taxation in Alabama and not included in answering Questions 11 to 17 above: 33,455,763 lbs. (net weight) of nitrate imported into Alabama by corporation and in store there in original package, book value $712,846.72."

Upon this return the State Tax Commission, on March 31, 1930, made a final assessment of a tax on the franchise of appellant for the year 1930 in the amount of $1,425.69

(R. 4), being $2 for each $1,000 of the value of the nitrate referred to in the return.

From this assessment appellant appealed to the Circuit Court of Montgomery County, Alabama, in equity, which entered a decree adjudging, *inter alia*, that the assessment be vacated and annulled (R. 21-22).

The State thereupon appealed to the Supreme Court of Alabama, and on May 12, 1932, the Court entered a judgment reversing the decree of the Circuit Court of Montgomery County, and remanding the cause for a decree upholding the validity of the assessment (R. 26). On June 9, 1932, an application for a rehearing was overruled (R. 38).

The appellant thereupon appealed to this Court (R. 42).

Specification of Errors

The appellant contends that the Supreme Court of Alabama erred in the following particulars:

1. In holding that the above quoted statute, as construed by the Supreme Court of Alabama in this case, is not unconstitutional and void as repugnant to Clause 2 of Section 10 of Article I of the Constitution of the United States, in that it (a) levies a tax on goods imported by appellant from a foreign country and maintained in Alabama in the original package; (b) levies a tax upon the right of appellant to sell in the original package goods imported by it from a foreign country, and measures the tax by the amount of property of appellant in the State of Alabama, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (c) levies a corporate franchise tax upon appellant for the privilege of en-

gaging exclusively in the business of selling in the original packages goods imported by it from a foreign country.

2. In holding that the aforesaid statute, as construed by the Supreme Court of Alabama in this case, is not unconstitutional and void as repugnant to Section 8 of Article I of the Constitution of the United States, in that it (a) levies a tax upon the right of appellant to carry on foreign commerce in the State of Alabama, and measures such tax by the amount of property of appellant in the State, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (b) levies a corporate franchise tax upon appellant for the privilege of engaging exclusively in foreign commerce in the State of Alabama.

Summary of Argument

I.

It is well settled that the Constitutional prohibition against states laying duties on imports extends to the occupation of the importer and the act of selling the imports (*Brown* v. *Maryland,* 12 Wheat. 419 [1827]; *Willcuts* v. *Bunn,* 282 U. S. 216, 228 [1931]). The sole business of appellant in the State of Alabama consisted of the sale in the original package of nitrate imported by appellant from abroad. Appellant had no property within the State except a stock of nitrate in a public warehouse, which nitrate at all times was retained in the original bags in which it was imported. Thus appellant did no local business within the State and had no capital employed there unless the nitrate be considered such. The State is therefore without power to levy a tax upon appellant for the privilege

of engaging exclusively in the business of selling in the original package the nitrate imported by it (*Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203 [1925]; *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555 [1925]; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147 [1918]).

II.

Although we submit that the foregoing is decisive of this case, appellant contends that even if it were true that the State had power to levy a franchise tax in some amount against appellant, such tax could not be measured by the value of the nitrate imported by appellant from a foreign country and held by it in the original package. The tax now sought to be imposed is measured solely by property admittedly immune from taxation and no attempt has been made in the tax scheme to separate local business from foreign commerce. The necessary effect of the statute in question, as construed by the Court below, is to require appellant to purchase from the State of Alabama the privilege of selling the imported nitrate which has been guaranteed it by the Constitution and to pay for such privilege a tax measured solely by the imports on hand for sale. It is submitted, therefore, that the measure adopted for the purpose of determining the amount of the tax is such as in reality to impose a burden on foreign commerce (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 [1910]; *Looney* v. *Crane Co.*, 245 U. S. 178 [1917]; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 [1918]; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460 [1929]; *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, 563, *supra*; *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218, *supra*; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470 [1931]).

ARGUMENT

I.

The State of Alabama is without power to levy a tax upon appellant for the privilege of selling in the original package goods imported by appellant from a foreign country.

The Supreme Court of Alabama has recognized that the tax now sought to be imposed is one upon the privilege or right to do business within the State. Thus, in *State* v. *National Cash Credit Association,* 141 So. 541 (1932) the Court said with reference to the statute in question (p. 545):

> "We merely hold a franchise tax to be what it purports to be, a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax."

The appellant contends that the statute in question, as construed by the Court below in this case, violates both the imports and commerce clauses of the Constitution of the United States, because it levies a tax upon the appellant for the privilege of selling in the original package goods imported by appellant from abroad and for the privilege of engaging exclusively in foreign commerce in the State of Alabama. The relevant Constitutional provisions will be discussed together, since, as was said by Mr. Justice Pitney in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292 (1917), at page 295:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign

commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. *Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms.* And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given." (Italics ours.)

A. The Constitutional prohibition against states laying duties on imports extends to the occupation of the importer and the act of selling the imports.

The relevant part of Clause 2 of Section 10 of Article I of the Constitution of the United States reads as follows:

> "No State shall without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

It has been settled law since the case of *Brown* v. *Maryland,* 12 Wheat. 419, was decided by this Court in 1827, that not only are the States forbidden to levy a property tax upon goods which have not lost their character as imports, but they are also prohibited from burdening by taxation the right of the importer to sell his imports, and that the right to sell is a necessary incident of the right to import.

In *Brown* v. *Maryland, supra,* there was involved a license tax of $50, imposed by the State of Maryland on "all importers of foreign articles or commodities * * * by bale or package." In holding this tax in violation of both the imports and commerce clauses of the Constitution, Mr. Chief Justice Marshall said (p. 444):

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

The far reaching doctrine laid down in this case has been reaffirmed in numerous later decisions, the most recent of which is *Willcuts* v. *Bunn,* 282 U. S. 216 (1931), where Mr. Chief Justice Hughes, speaking for the Court, said (p. 228):

> "When the Constitution prohibits States from laying duties on imports, the prohibition not only extends to a tax upon the act of importing, but also to one upon the occupation of the importer or upon the articles imported. A tax on the sale of an article, imported only for sale, is a tax on the article itself. *Brown* v. *Maryland,* 12 Wheat. 419, 444. Similarly,

> with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Marine Insurance Company* v. *United States,* 237 U. S. 19. Only on that construction can the constitutional safeguard be maintained."

In *Cook* v. *Pennsylvania,* 97 U. S. 566 (1878), it was held that a tax on the amount of sales made by an auctioneer was in effect a tax on the goods sold, and therefore in violation of the imports and commerce clauses of the Constitution when applied to sales of imported goods in the original package. Mr. Justice Miller, in delivering the opinion of the Court, said (pp. 570-571):

> "But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into

> the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales."

It will be noted that in the case cited, just as in the present case, it was argued that the authority of the appellant to make sales was derived from the state and was therefore subject to taxation. Nevertheless the Court held that the state could not impose a tax for the privilege of selling the imported goods.

See also: *May* v. *New Orleans,* 178 U. S. 496 (1900);
Fairbank v. *United States,* 181 U. S. 283 (1901);
Almy v. *California,* 24 How. 169 (1860);
Selliger v. *Kentucky,* 213 U. S. 200 (1909);
United States v. *Hvoslef,* 237 U. S. 1 (1915);
Thames & Mersey Marine Insurance Co. v. *United States,* 237 U. S. 19 (1915);
Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292, *supra.*

It must therefore be regarded as settled that any tax whatever is invalid if it interferes with the right of the importer freely to dispose of the goods imported by him, and denies to him "the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the state" (12 Wheat. at page 442).

B. A state has no power to levy a tax upon a foreign corporation for the privilege of engaging exclusively in the business of selling in the original package goods imported by it from a foreign country.

We have just seen that a tax upon an importer for the privilege of selling in the original package goods imported by him is in substance and effect a tax upon such imported goods. Thus a state may not, under the Constitution, impose such a tax.

In *Brown* v. *Maryland, supra,* the importers were individuals, but it is submitted that the doctrine of that case applies equally to corporations. It is well settled that interstate and foreign commerce carried on by corporations is entitled to the same protection against state exaction which is given to such commerce when carried on by individuals.

> *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S. 196 (1885);
> *Philadelphia & Southern Steamship Company* v. *Pennsylvania,* 122 U. S. 326, 342 (1887).

There can be no question that the same is true in cases arising under the imports clause of the Constitution. Thus in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, *supra,* a corporation was involved, yet it was held that both of the constitutional provisions now in question had been infringed.

A situation parallel to that in the present case may be found in the cases involving the right of a state to impose a tax upon a foreign corporation engaged exclusively in interstate commerce for the privilege or right to do busi-

ness in the state. It is now settled that in such cases a tax may not constitutionally be imposed.

Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203 (1925);

Ozark Pipe Line Corporation v. *Monier,* 266 U. S. 555 (1925);

Cheney Brothers Co. v. *Massachusetts,* 246 U. S. 147 (1918).

See also: *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1 (1910).

The *Ozark Pipe Line Corporation* case involved a Missouri statute which required every foreign corporation engaged in business in the State to pay an annual franchise tax based on the "par value of its capital stock and surplus employed in business" in the State. The statute was thus very similar to the one involved in the present case. The corporation was engaged exclusively in the operation of a pipe line for transporting petroleum through the State in interstate commerce, although it owned other property and maintained its principal office in Missouri.

The Court held the tax unconstitutional as a burden on interstate commerce, saying, per Mr. Justice Sutherland (p. 562):

> "The tax is one upon the privilege or right to do business, *State ex rel.* v. *State Tax Commission,* 282 Mo. 213, 234; and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived

> therefrom, or the occupation or business of carrying it on. *Leloup* v. *Port of Mobile,* 127 U. S. 640, 648; *Kansas City Ry. Co.* v. *Kansas,* 240 U. S. 227, 231, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of State taxation."

In answer to the contention that the corporation was also engaged in doing local business and was therefore subject to taxation, the Court said (p. 565):

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon the interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In the present case, the appellant had no property in the State of Alabama except the imported nitrate and possibly funds in payment for nitrate sold in the course of being transmitted from the local bank to the Merchants National Bank of Mobile and by that bank to New York. This was recognized by the Court below in its opinion when it said (R. 35):

> "The Tax Commission based the assessment upon the value of the nitrate on hand and in storage in

> Alabama on December 31, 1929, amounting in value to $712,846.72, with nitrate on hand outside of Alabama of the value of five million dollars."

Thus appellant had no capital employed within the State unless such nitrate be considered capital so employed. The nitrate was sold through orders taken by a salesman in the State and no order was effective until signed and approved by appellant in New York City. The salesman was compensated by commissions on his sales. He paid his own operating expenses. Under these circumstances it is plain that appellant did no local business and was engaged exclusively in selling the imported nitrate. The present case is therefore clearly within the rule of the *Ozark Pipe Line Corporation* case and similar cases.

It is also important to bear in mind that in the cases cited above the result noted was reached under the commerce clause of the Constitution, and accordingly it was necessary to determine that the tax regulated or imposed a burden upon interstate or foreign commerce. We submit that the present case is an *a fortiori* case when compared with the interstate commerce cases, for the reason that the Constitutional protection given to the import business is even greater than that given to interstate commerce. The distinction is that the immunity conferred by the imports clause of the Constitution attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on whether the tax challenged regulates or burdens interstate commerce.

For example, in cases which sustain an occupation or privilege tax the amount of which is based on sales of original packages of goods received in interstate commerce,

it is pointed out that the decision would be otherwise if the goods had been imported from abroad.

Sonneborn Bros. v. *Cureton,* 262 U. S. 506 (1923);
American Steel & Wire Co. v. *Speed,* 192 U. S. 500 (1904).

In *Sonneborn Bros.* v. *Cureton, supra,* there was involved an occupation tax imposed by the State of Texas on all wholesale dealers in oil, as applied to local sales, in original packages, of oil shipped into the State and stored there as stock in trade. It was argued on behalf of the taxpayer that goods brought from another state and held for sale in the original package were entitled to the same immunity as goods imported from abroad. The Court dismissed this contention, saying, per Mr. Chief Justice Taft (p. 510):

> "Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

In *American Steel & Wire Co.* v. *Speed, supra,* there was involved a so-called general merchants' tax and a merchants' privilege tax, levied by the State of Tennessee, as applied to goods manufactured in another state and stored in a warehouse in Tennessee in the original packages, so as to be available for ready distribution to customers in

Tennessee and other states. In upholding the tax, the Court distinguished between goods brought in from another state and held in the original package and imports from abroad, saying, per Mr. Justice White (pp. 519-520):

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be *directly or indirectly* taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the State for sale." (Italics ours.)

The clear implication of these cases is that, if the goods involved had been imports from abroad, as they are in the present case, the tax in each case would have been held invalid.

It may be urged on behalf of the State that since the tax in the present case is not measured by the total sales of nitrate made in Alabama during the year in question but by the value of the stock of nitrate on hand in the State on the tax day, no tax is in fact being levied against the imports, or upon the right to sell them. It is submitted that this contention mistakes the real point at issue. We shall discuss under Point II below the question whether, assuming for the purpose of argument that a tax in some amount might be levied against appellant, the tax might properly be measured by the value of the imports on hand on the tax day, but our contention is that any tax, however measured, has the effect of compelling the appellant to purchase a right guaranteed to it by the Constitution, namely,

the right to dispose of the goods imported by it and held in the original package. When the subject may not be taxed, the amount of the tax or the method by which it is measured is immaterial.

Thus, in *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, *supra,* a case involving the power of a state to impose an excise tax on a foreign corporation engaged solely in interstate commerce, the Court, per Mr. Justice McReynolds, said (p. 218):

> "The amount demanded is unimportant when there is no legitimate basis for the tax."

Nor is this a case of a state imposing a tax on a domestic corporation for the privilege of being a corporation (see, for example, *Kansas City, F. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227 [1916], and *Kansas City &c. R. R. Co.* v. *Stiles,* 242 U. S. 111 [1916], both cited by the Court below); it is an attempt by a state to impose a tax on a foreign corporation for the privilege of selling in the state in the original package goods imported by such corporation from abroad.

We submit, therefore, that the State of Alabama is without power, under the Constitution, to impose the tax involved in the present case.

C. The case of *New York State* v. *Roberts,* 171 U. S. 658 (1898), is not contrary to appellant's contentions herein.

It may be urged that the decision of this Court in *New York State* v. *Roberts,* 171 U. S. 658, is an authority in favor of the validity of the tax in the present case. Much reliance was placed on that case in the opinion of the Court below and for that reason we shall consider it carefully.

The *Roberts* case involved a statute imposing an annual franchise tax, applicable to both domestic and foreign corporations, based upon the amount of capital stock employed in the State of New York and graded according to the annual dividends of the corporation. By its terms the statute was inapplicable to manufacturing corporations engaged in manufacturing wholly within the State. Parke, Davis & Co., a Michigan corporation, had established a branch office in New York from which it sold and distributed drugs of its own manufacture and also imported crude drugs which in a large part were sent to its Detroit factory for use but some of which were sold in the original packages in New York. The corporation employed in New York a force of over fifty persons, had business fixtures valued at $15,000, and an average stock of goods sent from Michigan and carried in New York during the years in question of about $50,000. It also employed in New York during that period a continuing capital of from $23,000 to $62,000 per year used in the purchase and sale of crude drugs.

The principal contention made on behalf of the corporation was that, being a manufacturing corporation, it was exempt from the tax and that if the statute were otherwise construed it was unconstitutional as an unjust discrimination against foreign manufacturing corporations and in favor of those having their factories in New York. It was also urged, however, that the capital employed in the importation and sale of crude drugs should not have been taken into account in determining the amount of capital employed within the State.

The Court, two justices dissenting, sustained the tax, holding there was no purpose disclosed in the statute either to distinguish between New York corporations and those

of other states to the detriment of the latter, or to subject property out of the State to taxation. In rejecting the contention that the capital employed in the importation and sale of crude drugs should not have been taken into account, the Court, per Mr. Justice Shiras, said (p. 664):

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

It is apparent from the foregoing statement of the *Roberts* case that it is distinguishable from the present case. In the first place, Parke, Davis & Co. were admittedly doing a local business in the State of New York entirely apart from the importing and reselling of crude drugs in the original package. Except for the question of unjust discrimination, therefore, the State had the right to levy a franchise tax in some amount.

Thus the only question for the Court was whether the measure of the tax was proper. This question we shall discuss below (pp. 31-37), but we emphasize that it does not arise in the present case, since here, contrary to the fact in the

Roberts case, appellant did no business whatever in the State of Alabama except that incident to the selling of the imported nitrate in the original package.

The *Roberts* case is distinguishable from the present case for another reason. The New York tax in question was graded according to the annual dividends paid by the corporation and was therefore to a considerable extent dependent on net profits. In the present case the tax is measured, not by net income, but by the value of the imports on hand on the tax day. The burden is therefore direct and not merely incidental. It is well settled that a tax measured by net income may be sustained under circumstances where a similar tax measured by gross receipts would be invalid. See, for example, *United States Glue Company* v. *Oak Creek*, 247 U. S. 321 (1918), where the Court, per Mr. Justice Pitney, said (p. 328):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net income from whatever source arising, is but a

> method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

While not measured by gross receipts, the tax in the present case, measured solely by the value of the imports, conceivably, as stated in the above quotation, may be sufficient to make the difference between profit and loss or to diminish the profit so as to impede or discourage the conduct of the commerce.

Moreover, it is submitted that some of the language from the *Roberts* case quoted above, if given the effect given it in the opinion of the Court below, is inconsistent with later decisions of this Court. For example, it is said (171 U. S., at p. 664):

> "Here no tax is sought to be imposed *directly* on imported articles or on their sale." (Italics ours.)

It clearly appears from the cases discussed above at pages 10 to 13 that a tax may not be imposed on imports either directly or *indirectly*.

Also, the Court said in the *Roberts* case (p. 664):

> "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

Passing for the moment the question of its accuracy, this language assumes, as was true in that case, that a franchise tax in some amount might be imposed and that the only question was as to the measurement of the tax. In the present case, however, the privilege or franchise to engage in the business of selling in the original package the nitrate imported by appellant is not a proper subject of taxation by the State; no tax, however measured, may be imposed.

Further, we have the distinction made in the opinion in the *Roberts* case and adopted by the Court below in the present case when it said (R. 31-32):

> "The cases relied upon by appellee (*Ozark Pipe Corporation* v. *Monier*, U. S. Supreme Court, 69 Law Ed. 439; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Galveston H. & S. A. R. Co.* v. *Texas*, 52 Law Ed. 1031) involved the question of undue burden upon interstate commerce, immunity of which from state interference has been zealously guarded by our federal decisions (*Western Union Tel. Co.* v. *Kansas, supra*), and concerning which the court has expressed difficulty in prescribing a satisfactory rule, and as to which a distinction has also been made between corporations organized to carry on interstate commerce, and having a quasi public character, and corporations organized to conduct strictly private business. *New York* v. *Roberts, supra.*"

It is respectfully submitted that this distinction is unsound for the reason that it is now settled that a state may not impose a tax which has the effect of burdening interstate or foreign commerce, whether the corporation

has a quasi-public character or is organized to conduct a strictly private business.

International Paper Co. v. *Massachusetts,* 246 U. S. 135, 142 (1918).

Finally, it is no longer true, as was assumed by the Court in the *Roberts* case and by the Court below, that a state may impose such conditions as it may judge expedient upon permitting a foreign corporation (other than one having a quasi-public character) to do business within its limits. If the corporation is doing an interstate as well as a local business and the measure adopted for determining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. The power to burden interstate commerce does not exist merely because of the general power of the state to exclude a corporation from doing local business.

Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, *supra;*

Looney v. *Crane Co.,* 245 U. S. 178 (1917);

International Paper Co. v. *Massachusetts,* 246 U. S. 135, *supra;*

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460 (1929).

See also: *Ozark Pipe Line Corporation* v. *Monier,* 266 U. S. 555, 563, *supra;*

Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203, 218, *supra;*

East Ohio Gas Co. v. *Tax Commission,* 283 U. S. 465, 470 (1931).

Plainly, no attempt has been made in the present case to separate local business from that of selling in the original package the imported nitrate. To do so obviously would have resulted in no tax being imposed, since there was no local business to tax.

In conclusion on this point, let us refer briefly to the cases of *Paul* v. *Virginia,* 8 Wall. 168 (1868), *Home Insurance Co.* v. *New York,* 134 U. S. 594 (1890), and *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305 (1892), cited in the *Roberts* case to sustain the tax there in question.

In *Paul* v. *Virginia, supra,* this Court sustained the power of a state to exclude foreign insurance companies from its limits, or to impose conditions upon their entering the state for purposes of their business, holding, *inter alia,* that issuing a policy of insurance was not a transaction of commerce within the meaning of the commerce clause of the Constitution. The case is therefore clearly distinguishable on its facts from the present case and it is submitted that the statement from the case quoted in the opinion of the Court below (R. 28) must be read with such facts in mind.

The *Horn Silver Mining Co.* case involved a tax imposed by the State of New York on the "corporate franchise or business" of domestic and foreign corporations. The tax, as applied to a foreign corporation doing business in the State, was upheld, although measured by the entire capital stock of the corporation, which was only partially employed in New York. Passing the question whether, under later decisions of this Court, the method of measuring the tax might not be objectionable, it is clear that the case is distinguishable from the present case. Admittedly, the Horn Silver Mining Co. was doing a local business in New York

and was therefore subject to a franchise tax. As in the *Roberts* case, the only question was as to the measure of the tax.

The *Home Insurance Co.* case is cited by the Court below for the proposition that "an excise tax may properly be measured by tax immune property" and there is quoted in its opinion a statement from the case to the effect that the validity of the tax can in *no way* be dependent upon the mode which the state may deem fit in fixing the amount for any year which it will exact for the franchise (R. 29). The actual decision in the case, however, was that the New York statute involved in the *Horn Silver Mining Co.* case, as applied to a *domestic* corporation, was valid, although the tax was measured *in part* by capital stock invested in United States bonds. We have pointed out above (p. 20) that cases involving the power of a state to tax domestic corporations are not in point in the present case and in any event it is submitted that, in view of more recent decisions of this Court, the case is no longer authority for the proposition that the validity of a tax depends solely on the *subject* on which it is levied and in no way on the *measure* by which its amount is determined.

It therefore appears that the *Roberts* case is clearly distinguishable from the present case and that in any event the entire trend of franchise tax cases in this Court since the *Roberts* case is opposed to the reasoning in that case relied on by the Court below to sustain the tax now in question.

D. The fact that appellant qualified to do business in the State of Alabama does not indicate it was doing a local business so as to entitle the State to impose a franchise tax.

It may be urged on behalf of the State that when appellant qualified to do business in Alabama, it subjected itself to the imposition of a franchise tax. It is submitted that this is entirely immaterial because even if appellant did an unnecessary act, even if it could have come into the State of Alabama without the consent or license of the State, this fact would have no bearing whatever upon the power of the State to levy the tax in question. The question is one of fact, namely, was the appellant engaged only in the business of selling goods in the original package which it had imported? The entrance fee is payable only once, and appellant might well have paid it rather than engage in controversy regarding the matter.

This precise question was answered by this Court in *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, *supra*, when Mr. Justice Sutherland, speaking for the Court, said at page 567:

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. The State has no such power even in the case of domestic corporations. See *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

It is clear that the foregoing decision is conclusive of the point now in question.

E. There can be no question that the nitrate here involved constitutes imports in the original package within the rule of *Brown* v. *Maryland* and subsequent cases.

We refer to this question only because of the following statement in the opinion of the Court below (R. 33-34):

> "The nitrate is shown to have been imported from Chile in one hundred pound sacks, and that is the form in which it was sold. We are not prepared to concede that the doctrine of 'original package' cases would be extended to embrace importation of goods as to which the method of shipment was likewise the method of sale; and we interpret some of the reasoning of the opinion in *May* v. *New Orleans, supra,* as tending to this view. Certainly such an interpretation of the Constitution would at least have a tendency to encourage merchants and traders seeking to avoid state and local taxation, to import from abroad their merchandise in original salable packages."

It is respectfully submitted that this dictum is entirely unsound and that a more appropriate case than the present for the application of the original package doctrine could scarcely be conceived. In *May* v. *New Orleans,* 178 U. S. 496, *supra,* this Court held that the term "original package" meant the package in which the goods were received by the importer, saying, per Mr. Justice Harlan, at pages 508-9:

> "In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost

> its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its limits * * *."

Surely it cannot be said that merely because in the present case the natural and convenient unit of one hundred pounds is suitable for both the importation and the sale of nitrate, the importer is to be deprived of the immunity from taxation which the Constitution affords to his goods and his right to sell them. The present case cannot reasonably be said to be at all comparable to cases such as *Austin* v. *Tennessee*, 179 U. S. 343 (1900), and *Cook* v. *Marshall County*, 196 U. S. 261 (1905), where the goods in question (cigarettes) were shipped in an obviously unnatural manner. Cf. *Kirmeyer* v. *Kansas*, 236 U. S. 568 (1915).

We submit, therefore, that there can be no question that the nitrate here involved constitutes imports in the original package within the rule of *Brown* v. *Maryland* and subsequent cases.

II.

Even if it were true that the State had power to levy a franchise tax against appellant, such tax could not be measured by the value of goods imported by appellant from a foreign country and held by it in the original package.

We have endeavored to show above that the State of Alabama is without power to levy any tax against appellant for the reason that appellant is engaged exclusively in the business of selling in the original package goods im-

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> "The nitrate is shown to have been imported from Chile in one hundred pound sacks, and that is the form in which it was sold. We are not prepared to concede that the doctrine of 'original package' cases would be extended to embrace importation of goods as to which the method of shipment was likewise the method of sale; and we interpret some of the reasoning of the opinion in *May* v. *New Orleans, supra,* as tending to this view. Certainly such an interpretation of the Constitution would at least have a tendency to encourage merchants and traders seeking to avoid state and local taxation, to import from abroad their merchandise in original salable packages."

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Even if it were true that the State had power to levy a franchise tax against appellant, such tax could not be measured by the value of goods imported by appellant from a foreign country and held by it in the original package.

We have endeavored to show above that the State of Alabama is without power to levy any tax against appellant for the reason that appellant is engaged exclusively in the business of selling in the original package goods im-

ported by it from abroad, all its activities in the State being incidental to such business. The Court below paid little attention to this contention, however, and the major portion of its opinion is concerned with the question of measurement of the tax. Therefore, we deem it necessary to discuss it here. Relying on *Educational Films Corporation* v. *Ward*, 282 U. S. 379 (1931), *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), and similar cases, the Court below concluded that the tax now in question was not objectionable although it was measured by tax-immune property. The Court said (R. 27):

> "But we think the argument stresses too far the inhibition against state taxation of imports found in our Federal Constitution and overlooks the nature of the tax here in question. * * * The franchise tax here imposed applies alike to all foreign corporations engaged in business in this state. It makes no reference to imports, which are here involved solely because of the business in which the corporation was engaged."

We are not attempting to question the rule laid down in *Flint* v. *Stone Tracy Co., supra*, and applied in the *Educational Films Corporation* case. In the latter case, the New York statute involved imposed an annual franchise tax, payable both by domestic and foreign corporations, computed on the basis of the corporation's *entire net income for the preceding year.* The tax was challenged by a domestic corporation on the ground that included among such income was income from federal instrumentalities, namely, income from copyrights.* The tax was upheld on the

* In *Fox Film Corporation* v. *Doyal*, 286 U. S. 123 (1932), this Court, overruling *Long* v. *Rockwood*, 277 U. S. 142 (1928), held that copyrights were not federal instrumentalities.

ground that it imposed no real or direct burden on the Federal Government, the Court, per Mr. Justice Stone, saying (p. 389):

> "* * * While this Court, since *McCulloch* v. *Maryland*, 4 Wheat. 316, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, * * * it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other."

We submit that the *Educational Films Corporation* case is clearly distinguishable from the present case. In the first place, as pointed out above, we contend that the franchise exercised by appellant in the State of Alabama is not a legitimate subject of taxation by the State. No such question was involved in the *Educational Films Corporation* case.

But even if such franchise be assumed for the purpose of argument to be a legitimate subject of taxation, the tax in the present case, measured *solely* by property admittedly immune from taxation, is invalid because it does not merely incidentally and remotely affect imports, but directly affects them just as much as if it were levied against the imports themselves. We have shown above (p. 26) that if the measure adopted by a state for the purpose of deter-

mining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. We have also shown that no distinction can be made between interstate and foreign commerce in this respect. To sustain the measure of the tax, therefore, it must appear that there is a separation in the tax scheme between local business and interstate or foreign business (see cases cited at page 26 above). But the Court below, in the present case, has otherwise construed the statute in question, stating (R. 35):

> "The Tax Commission based the assessment upon the value of the nitrate on hand and in storage in Alabama on December 31, 1929, amounting in value to $712,846.72 * * *."

The result is that the tax, if sustained, will be measured solely by non-taxable imports. It is therefore submitted that this would constitute an unconstitutional burden on the right of appellant to sell in the original package the nitrate imported by it.

Moreover, in both the *Educational Films Corporation* and *Stone Tracy* cases, the tax was measured by general net income, only a part of such income being derived from tax exempt property. In the *Stone Tracy* case, Mr. Justice Day, delivering the opinion of the Court, said (p. 165):

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced *in part* from property which of itself considered is non-taxable. Applying that

> doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, *in part at least*, property which as such could not be directly taxed." (Italics ours.)

Thus in such cases the subject of taxation, otherwise immune, may be said to lose its immunity when the income therefrom is merged with general income. That this distinction is sound is shown quite conclusively by the fact that similar gross receipts or gross income taxes are uniformly held invalid.

Philadelphia & Southern Steamship Company v. *Pennsylvania*, 122 U. S. 326, *supra;*

Galveston, Harrisburg &c. Ry. Co. v. *Texas*, 210 U. S. 217 (1908);

Oklahoma v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912);

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, *supra;*

Northwestern Mutual Life Insurance Co. v. *Wisconsin*, 275 U. S. 136 (1927);

New Jersey Tel. Co. v. *Tax Board*, 280 U. S. 338 (1930).

See also: *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328, *supra;*

Fox Film Corporation v. *Doyal*, 286 U. S. 123 (1932).

In the present case, the tax, while not measured by gross receipts, nevertheless is graduated according to the

capital employed in the business taxed and, being measured solely by the value of the imports held in the original package for sale, is rather within the rule of the gross receipts cases than that of the cases involving net income. A general tax on all net income may not cause any unwarranted burden on any particular enterprise from which such income issues, whereas it is submitted that a tax measured in the manner employed in the present case has such an effect.

It may be urged on behalf of the State that in the present case this result is merely accidental and that, as stated by the Court below, the statute does not "indicate any purpose to in any manner interfere with imports or foreign commerce." We submit that this argument fails for the reason that a statute which has the necessary effect of taxing imports or the right of the importer to dispose of his goods is as much within the Constitutional prohibition as a statute which singles out as its object the prohibited subject of taxation.

> *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 294, *supra;*
> *Kansas City, F. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227, 231, *supra.*

The fact that the statute may not disclose an intention on the part of the legislature to reach a forbidden subject of taxation indicates at most that one possible vice in the statute does not exist. It does not indicate that the statute may not be otherwise objectionable.

In the present case, the necessary effect of the statute in question, as construed by the Court below, is to require appellant to purchase from the State of Alabama the privilege of selling the imported nitrate which has been guar-

anteed it by the Constitution and to pay for such privilege a tax measured by the imports on hand for sale. The practical effect of the tax is exactly the same as if the State of Alabama levied a direct tax of two dollars on each one thousand dollars in value of the nitrate maintained by appellant in the original package.

Conclusion

We are asking only that the Court apply to the case of an importer engaged exclusively in selling in the original package goods imported by it, the well-established rule that a state may not impose a tax upon a foreign corporation engaged exclusively in interstate or foreign commerce for the privilege or right to do business in the state. We urge that this doctrine is unquestionably applicable in the present case because of the rule laid down in *Brown* v. *Maryland, supra,* and repeatedly reaffirmed, that when the Constitution prohibits states from laying duties on imports, the prohibition extends not only to a tax upon the act of importing, but also to one upon the occupation of the importer. The tax in the present case, therefore, infringes both the imports and commerce clauses of the Constitution and cannot be sustained.

Although the foregoing is decisive of this case, we submit, further, that the tax in question is invalid because it is measured solely by non-taxable property, with no attempt in the tax scheme to separate local business from foreign commerce. Any such separation in the present case, of course, would result in no tax being imposed, since appellant is doing no local business in Alabama. In any event, therefore, the judgment of the Supreme Court of

Alabama should be reversed and the decree of the Circuit Court of Montgomery County, Alabama, affirmed.

Respectfully submitted,

R. Worth Vaughan,
Counsel for Appellant.

Elihu Root, Jr.,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 377.

ANGLO-CHILEAN NITRATE SALES CORPORATION,
APPELLANT,

VS.

THE STATE OF ALABAMA,
APPELLEE.

Appeal from the Supreme Court of the State of Alabama.

BRIEF FOR THE APPELLEE.

THOMAS E. KNIGHT. JR.,
Attorney General of Alabama.

FRONTIS H. MOORE,
Assistant Attorney General of Alabama.

Counsel for Appellee.

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Appeal from the Supreme Court of the State of Alabama.

BRIEF FOR THE APPELLEE.

This case comes before the Court on appeal from the Supreme Court of Alabama and involves the levy of a franchise tax by the State on the Appellant Corporation, which tax the Appellant claims to be illegal because the property upon which the tax was measured is asserted to have consisted of imports. The assessment against the Appellant for the amount of the tax was made by the State Tax Commission, on the 31st day of March, 1930, (Record, p. 4). An appeal was taken to the Circuit Court of Montgomery County, in Equity, from such assessment (Record, p. 1). The Circuit Court of Montgomery County by decree filed November 27, 1931, va-

cated and annulled said assessment (Record, pp. 21, 22). An appeal was taken by the State to the Supreme Court of Alabama (Record, p. 22). The Supreme Court by judgment rendered May 12, 1932, reversed the decree of the Circuit Court and remanded the cause with directions for decree in accord with the judgment of the Supreme Court. The judgment appears on page 26 of the Record and the opinion on pages 26-36, inclusive, of the Record. Application for rehearing was filed on May 27, 1932 (Record, p. 37) and overruled by the Supreme Court on June 9th, (Record, p. 38).

QUESTIONS PRESENTED.

Appellants brief (p. 2) under the foregoing heading states the proposition presented in this manner:

> "Is Section 54 of Act No. 163 approved July 22, 1927, Alabama General Acts, 1927, p. 176, under which the tax involved in this suit was assessed against the Appellant, as construed by the Supreme Court of Alabama in this case, unconstitutional and void as repugnant to clause 2 of Section 10 of Article I, and/or Section 8 of Article I of the Constitution of the United States?"

We submit that the entire record will disclose that the validity of the statute as such is not involved, but only the legality of this particular tax. As we understand it, the constitutionality of the Alabama franchise tax on foreign corporations has been upheld by this Court, and the only question that this Court is here called upon to determine is whether the Supreme Court of Alabama correctly construed its application under the particular facts presented in this case. The validity of the assessment and not the

constitutionality of the law itself is the question before this Court.

THE STATUTE INVOLVED.

Section 54 of Act No. 163 approved July 22, 1927, (General Acts of Alabama, 1927, page 176) quoted on page two of Appellant's brief is a re-write of Section 11 of the Revenue Act of 1923, (General Acts, 1923, page 164, Section 11) as amended by Act approved September 13, 1923 (General Acts, 1923 ,page 266). The 1923 Act was a re-write of Section 16 of the General Revenue Act of 1919 (General Acts, 1919, page 291, Section 16). This in turn was a re-write of clause two of Section 16 of the Revenue Act of 1915, (General Acts 1915, page 397, Section 16). All of these Acts are almost identical except that the rate has been changed by the various Acts.

The 1915 Act was construed in the case of Louisville and Nashville Railroad Company vs. State, 201 Ala. 317, and the Act held constitutional. This case was brought to this Court and certiorari denied.

Louisville & Nashville Railroad v. State, 39 Supreme Court Reporter, page 18.

Alabama also levies a franchise tax on domestic corporations based on the actual amount of capital stock. This statute was construed by the Supreme Court of Alabama in Kansas City, Memphis & Birmingham Railroad Company vs. Stiles, 182 Ala. 138, and upheld by this Court in opinion appearing in 37 Supreme Court Reporter at page 58.

Both of the statutes levying a franchise tax on domestic and foreign corporations are legislative responses to the

mandates of Section 229 and 232 of the Constitution of Alabama of 1901. These Sections are as follows:

"229. The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws."

"232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

STATEMENT OF FACTS.

The case was tried upon an agreed statement of facts which appears at pages 16-20 of the Record. Summarized these facts disclose that the Appellant was a Corporation

organized under the laws of the State of New York; that it had qualified to do business in the State of Alabama on October 10, 1927; that it had continued its qualification in the State of Alabama as evidenced by its filing a return for franchise tax with the State Tax Commission as required by law; that between the date of qualification, to-wit October 10, 1927, and March 31, 1930, the Corporation was engaged in the business of importing into the United States nitrate of soda from Chile, South America, through the port of Mobile, Alabama; that it sold and delivered said nitrate of soda to customers both within and without the State of Alabama; that on December 31, 1929, the Corporation had on hand 33,455,763 pounds of nitrate of soda which had been imported by it from Chile, South America, which was stored in public warehouses in the City of Mobile, Alabama. That all of said nitrate of soda, when imported into the United States through the Port of Mobile, Alabama, was contained in bags, each bag containing approximately 100 pounds of nitrate of soda, and that said nitrate of soda was stored in a public warehouse in said original bags, and subsequently sold and delivered by the corporation in the original bags in which the same was imported. That between the date of importation of said nitrate of soda into the United States through the Port of Mobile, Alabama, and its sale and delivery by the Corporation, none of said nitrate of soda has been removed from the original bags in which it was imported, nor have the original bags at any time been broken into. That the Corporation sold said nitrate through a salesman in the State of Alabama; that orders were subject to approval by the Corporation in New York and directions for shipment were given to the warehouse company; that the Corporation had bills receivable in Alabama amounting to $7,277.37; that the State Tax Commission assessed

against the Corporation a franchise tax based upon the value of such nitrate as shown by the return, at the legal rate of $2.00 per $1,000 making the tax $1,425.69. The Supreme Court of Alabama found from the facts that the Corporation was doing business and engaging in corporate activities within the State of Alabama. Attention is called to these comments appearing in the opinion (Record, p. 27):

> "The defendant duly qualified as a foreign corporation to do business in this State, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the State appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from State taxation."

> "We attach no significance to the requirement that orders must first be approved in the New York office; nor to the fact that when shipment was made it was with bill of lading and shipping instructions through the bank nearest the customer, the sale being for cash and the proceeds forwarded by such local bank to the Merchants National Bank in Mobile, and by that bank at once forwarded to the corporation in New York. These details go to show the corporation was actually engaged in business in this State, and enjoying the protection of its laws, and the mere fact that the proceeds of the business did not linger on deposit in this State, but were forwarded to the New York office does not serve as a point of material differentiation in this case and that of the Roberts case." (Record, page 33).

While the foregoing comments of the Supreme Court of Alabama represent its conclusions from the statement

of facts we think the attention of this Court should be directed thereto because of the quotation from State vs. National Cash Credit Association, 141 So. 541, found on page 9 of Appellant's brief. It is very clear that the Supreme Court of Alabama in the present case found that the Corporation was exercising corporate activities in Alabama.

SUMMARY OF ARGUMENT.

I.

The Appellant was engaged in business in the State of Alabama as a Corporation, and was carrying on the same in corporate form. As such it was liable for the corporate franchise tax levied on all foreign corporations doing business in a corporate capacity within the State of Alabama.

Section 232, Constitution, 1901;
Acts 1927, p. 176; Section 54;
Southern Railway v. Greene, 160 Ala. 396, 216 U. S. 400;
L. & N. Railway v. State, 201 Ala. 317; 39 Sup. Ct. Rep. 18;
K. C. M. & B. Ry. Co. v. Stiles, 182 Ala. 138, 37 Sup. Ct. Rep. page 58.

II.

The tax imposed is a franchise tax and not a property tax and whether the capital be invested in property otherwise exempt from taxation is immaterial for the reason that the tax is not imposed upon property, but for the privilege of exercising the franchise granted by the State.

Home Insurance Company v. New York, 134 U. S. 594;
Horn Silver Mining Co. v. New York, 143 U. S. 805;
People ex rel Commercial Cable Co. v. Morgan, 67 L. R. A. 962.

III.

The tax is not imposed upon imports as such but on the corporate franchise.

New York State v. Roberts, 171 U. S. 658;
Educational Films Co. v. Ward, 51 Supreme Court, 170;
Flint v. Stone Tracy Co., 220 U. S. 107.

ARGUMENT.

THE TAX IS A FRANCHISE TAX UPON THE CORPORATION FOR THE PRIVILEGE OF EXERCISING THE CORPORATE FRANCHISE IN ALABAMA. THE ACT LEVYING THE TAX IS A LEGAL AND VALID EXERCISE OF THE STATE'S POWER AND HAS BEEN UPHELD BY THIS COURT.

The tax is manifestly a franchise tax on the Corporation for the privilege of exercising its corporate franchise in Alabama. It is so denominated by the Constitution and by the statute, and as such it has been construed and upheld by the Supreme Court of Alabama throughout its history.

Southern Railway v. Greene, 160 Ala. 396, 216 U. S. 400;

L. & N. Railway v. State, supra;
State v. Anglo-Chilean Nitrate Sales Corporation, 142 So. 87, (Record, pp. 26-36, not yet officially reported);
Section 232, Constitution 1901;
Acts 1927, page 176, Section 54.

Taxation of corporate franchises as such have been upheld by this Court in the following cases:

St. Louis-Southwestern R. R. Co. v. Arkansas, 235 U. S. 350;
Postal Telegraph Company v. Adams, 155 U. S. 688;
Kansas City-Fort Smith & M. H. Co. v. Botkins, 240 U. S. 227;
Ashley v. Ryan, 153 U. S. 436;
Home Insurance Company v. New York, 134 U. S. 594;
Horn Silver Mining Company v. New York, 143 U. S. 305;
Flint v. Stone Tracy Co., 220 U. S. 107.

The Alabama franchise tax has been sustained by this Court in L. & N. v. State, supra, and K. C. M. & B. v. Stiles, supra.

While the Greene case was reversed by this Court, the holding that the tax was a franchise tax on the corporation was not disturbed, and as pointed out, the petition for certiorari in the L & N. R. R. case was denied.

While a franchise tax on foreign corporations is usually termed a franchise tax for the privilege of doing business in the State, yet the distinction between a franchise tax on a corporation for the privilege of conducting business in corporate form and the ordinary license or occupation tax is clearly marked. There is and can be but one franchise tax of this nature. There may be numerous special license or occupational taxes depending on the statutes

of the State and the activities in which the taxpayer whether corporate or individual may engage. This principle has been clearly recognized by this Court.

In Flint v. Stone Tracy Co., at page 145, this Court defined the Federal Corporate excise tax in this manner:

> "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000.00 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory, as heretofore stated."

THE TAX IMPOSED IS A FRANCHISE TAX AND NOT A PROPERTY TAX AND WHETHER THE CAPITAL BE INVESTED IN PROPERTY OTHERWISE EXEMPT FROM TAXATION IS IMMATERIAL FOR THE REASON THAT THE TAX IS NOT IMPOSED UPON PROPERTY, BUT FOR THE PRIVILEGE OF EXERCISING THE FRANCHISE GRANTED BY THE STATE.

In the case of Home Insurance Company v. New York, 134 U. S. p. 594, where a New York statute levied a tax on the corporate franchise of corporations measured by the income this Court held that income received from bonds of the United States Government otherwise exempt should be included in the income used to measure the amount of the tax.

> "It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross re-recipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

> "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property." And the manner in which its value shall be assessed and the rate of taxation, however arbitrary and capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax . . . a tax upon a corporation may be proportioned to the income as well as to the value of the franchise granted or the property possessed."

Delaware Railroad Tax case, 18 Wall. 206, at p. 231.

In New York v. Roberts, 171 U. S. 658, this Court after first quoting from Paul v. Virginia, 8 Wall. 168, and Horn Silver Mining Co. v. New York, 143 U. S. 305, said:

> "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State."

In the recent case of Educational Films Corporation v. Ward, 51 Supreme Court 170, the Court held:

> "That the tax on corporations for the privilege of doing business computed on basis of corporations entire net income for preceding year held not void as tax on federal instrumentalities, though authorizing inclusion of income from copyrights."

This case reviewed most of the authorities and we submit while not on the direct question before us, as in the case of Roberts, supra, clearly determines that a tax on a corporation for the privilege of exercising its corporate functions or doing business as a corporation is not a tax on the property used as a measurement of the tax and the fact that such property is exempt from other taxation does not relieve the corporation from paying the franchise tax required of it, even though the measurement of the amount of the tax is to be determined by property otherwise exempt.

Among other things this Court in the Educational Films case said:

"Under the Constitution the privilege of exercising the corporate franchise is the legitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crosland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stone Tracy Co., 220 U. S. 107, 162, et seq., 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this concluison, the court reaffirmed the dis-

tinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.

"Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. A state inheritaance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, * * *. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, and by the United States on a bequest to a municipality. * * * Similarly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. Van Allen v. Assessors, 3 Wall. 573, 583, 18 L. Ed. 229; * * * A tax on net income is not a forbidden tax on exports because it includes receipts from exports in the computation of the income, Peck & Co. v. Lowe, 247 U. S. 165, * * * Nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. United States Glue Co. v. Oak Creek, 247 U. S. 321. * * *"

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a

> tax such as the present, which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

It is therefore submitted with confidence that the State of Alabama may levy a franchise tax on a foreign corporation for the privilege of exercising its corporate franchise in the State and in doing so may measure the tax in such manner as it sees fit, provided that in doing so it does not impose a burden on interstate or foreign commerce.

THE TAX HERE IMPOSED IS NOT IMIMPOSED UPON IMPORTS AS SUCH BUT ON THE CORPORATE FRANCHISE AND HENCE IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

While a State may not levy a tax on imports or impose a tax on the business of foreign commerce, it is submitted that the tax here attacked is not a tax on imports, nor is it in substance or effect a tax on the business of engaging in foreign commerce.

There is as pointed out a definite and distinct difference between a corporation franchise tax and a license or occupation tax for the privilege of engaging in a particular avocation.

Under the authorities quoted and cited above the State in fixing a basis of measurement for corporate franchise tax may include tax exempt property, even the income from bonds of the United States. We submit the question should be decided on these authorities but the particular question as we conceive it has been before this Court and decided adversely to Appellant's insistence.

In New York State v. Roberts, 171 U. S. 658, the facts were that Parke Davis Co., a Michigan corporation was engaged in business within the State of New York. The State of New York levied a franchise tax upon corporations measured in this manner:

> "The amount of capital stock which shall be the basis for tax under the provisions of section three in in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

Prior to the Roberts case the New York Court of Appeals had thus construed this statute:

> "A franchise stock corporation owns three things: (1) its capital stock existing in money or property; (2) its surplus, if any; (3) its franchise. *The franchise is the thing taxed,* and the tax is computed upon the basis of the amount of its capital stock employed within the State. The share stock, or in other words, the paper certificates held and owned by individuals, are not employed within this state. It is the capital represented by such certificates that is so employed. * * * Capital stock was defined as 'money or property which is put into a single corporate fund by those who by subscription therefore become members of the corporate body.' *'Capital stock' and 'capital' are practically the equivalent of each other when considered as a basis for a franchise tax."*
>
> People ex rel Commercial Cable Co. v. Morgan, 178 N. Y. 433, 67 L. R. A. 960.

This case decides that "capital stock" as used in the statute and "capital" are practically the equivalent of

each other. This construction given by the New York Court renders the statute construed in the Roberts case to be in effect the same as the Alabama Statute.

Parke Davis and Company had a warehouse and depot in New York City and there kept manufactured products sold at wholesale in original packages. The Company imported crude drugs from foreign countries. Some of these were sent to the Detroit factory for use and some were sold in the original packages in the City of New York.

The claim was made that the inclusion of these imports in the capital employed in the State was invalid and violative of the Federal Constitution.

In answer to this contention this Court said:

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of Brown v. Maryland, 12 Wheat. 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. *From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.* Society for Savings v. Coite, 6 Wall. 594; Provident Institution v. Massachusetts, 6 Wall. 611; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Home Insurance Co. v. New York, 134 U. S. 594.
>
> "When a corporation of one state, whose business is that of a common carrier, transacts part of that

business in other states, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective states infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different states, and the subject has been much discussed in several recent cases. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Pittsburgh, Cincinnati, etc. Railway Co. v. Backus, 154 U. S. 421; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 165 U. S. 194. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

"The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of Paul v. Virginia, 8 Wall. 168, and of subsequent cases affirming that one. Horn Silver Mining Co. v. New York, 143 U. S. 305, may be specially mentioned, as it involved a similar question and the same statutes which are before us in the present case. The Horn Silver Mining Company was a corporation of the Territory of Utah, where it carried on a mining and manufacturing business. It also carried on business in the State of New York, and was there subjected to an annual tax upon its corporate franchise or business as prescribed in the statute of the State of New York. The company refusing to pay the tax, proceedings to enforce its payment were resorted to, which resulted in the case being brought to this court, where some of the questions raised in the present case were considered and determined. The conclusions reached were that the law in question did not tax property not within the State;

nor regulate interstate commerce; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the state."

We have discussed this case at length because, we submit, the facts and the statute construed bear close resemblance to the case now before the Court.

In the Roberts case only a part of the capital employed was employed in imports. According to Appellant's contention in the present case all the capital employed in Alabama is represented by imports. We respectfully submit that the principle involved is not thereby affected. If the tax is on the corporation for the privilege of exercising its corporate functions in Alabama, then all capital employed can be used in the measurement of the amount.

It is particularly to be noted that in the New York case the tax was measured according to the amount of capital stock employed in the State, and not according to annual dividends or net profits. While a portion of the report of the case would so indicate, a careful reading will disclose that the statute had been amended as set out in the opinion, and as quoted above. Capital stock so used, was construed by the New York Court of Appeals to be equivalent of capital employed. This construction was binding on this Court when it came to decide the Roberts case.

Appellant attempts to distinguish the Roberts case by quoting from United States Glue Company v. Oak Creek, 241 U .S. 321. While it is respectfully submitted that the effect of this case is to support Appellee's contention rather than that of Appellant, the inference attempted to be drawn therefrom by Appellant is inapplicable because of a misconception of the facts in the Roberts case.

The tax there was not measured by net income or net profits but by capital stock (i. e. capital) employed in the State.

The entire burden of Appellant's brief is that the tax is a tax on imports or is a regulation of foreign commerce. Clearly it is not a tax on the imports as such. If the original packages had been broken and mixed with the general mass of property in the State, the franchise tax would have been no different. The tax is laid on the corporate franchise, measured by the amount of property in the State. The tax is non-discriminative applying alike to all foreign corporations which choose to exercise their corporate franchises in the State of Alabama.

Neither is it a license on the sale of such imports or a regulation of foreign commerce. It is immaterial so far as the nature of the tax is concerned whether the capital employed in the State of Alabama on which the tax is measured consists of property otherwise tax exempt or not.

The tax does not and can not have the same effect as a sales tax or a license tax for the privilege of selling imports. The tax is on the corporate privilege and any effect it may have on imports is merely incidental. If the capital employed in Alabama were employed in property exempt from taxation under Alabama laws we submit Appellant could not argue for a moment that the value of the franchise can not be measured by such property. Is the rule different as to property otherwise exempt?

The tax clearly not being a tax on imports, appellant argues that its business was exclusively foreign commerce and hence the effect is the taxation or regulation of such commerce.

The statement of facts discloses that Appellant regularly qualified to do business in Alabama. There was

no restriction to this qualification, but Appellant qualified to do whatever business it desired. It imported nitrates into Mobile, stored them there, and sold the same, both within and without the State of Alabama. We submit, as was concluded by the Supreme Court of Alabama that the Appellant was conducting some local operations in Alabama. If imports were not involved no question could have arisen as to the local nature of the business. Appellant recognized this fact and qualified to do business in Alabama. That fact, we submit, should estop Appellant from any claim that it is not doing business within the meaning of the Constitution and the statute.

The Alabama franchise law was before this Court in Kansas City M. & B. Railway Co. v. Stiles, supra, and this Court after differentiating between the Alabama tax and that condemned in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, said of the Alabama franchise tax:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in Kansas City, Ft. S. & M. R. Co. v. Botkin, supra, is the nature and character of the tax imposed. The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce.
>
> "We find nothing in the amount or character of the tax which makes it a burden upon interstate com-

merce, and so beyond the authority of the state to impose."

The Louisville and Nashville Railroad case involving the statute here involved was decided in a memorandum decision as follows:

> "Dismissed for want of jurisdiction upon the authority of St. Louis-Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 35 Supreme Court 99, Kansas City, Memphis and Birmingham R. Co. v. Stiles, 242 U. S. 111, 37 Supreme Court page 58."
> L. & N. R. R. vs. State, supra.

These two cases, we submit, clearly uphold the constitutionality of the Alabama franchise tax as levied upon both domestic and foreign corporations and removes the same from the rule applied in Western Union Telegraph Co. v. Kansas. With this Court thus upholding this particular law, and in the face of the case of New York v. Roberts, 171 U. S. 658, we submit the weight of authority is opposed to the position taken by Appellant.

While a State may not tax imports or regulate foreign commerce, we submit that a tax measured by capital employed in such imports is not invalid "where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

It is submitted that there is nothing in the amount or character of the tax which makes it a burden on or regulation of foreign commerce beyond the authority of the State to impose.

The tax is levied upon the corporate franchise—a legitimate exercise of the State's prerogative. The measurement of the tax is based on the amount of capital employed by the corporation within the State of Alabama. It is

not a sales tax or a tax on gross receipts where every transaction might be affected. It is not even an ordinary occupational tax for the privilege of selling its products. There is no attempt to regulate, license or tax the business of the corporation. Only the exercise of the corporate franchise is taxed. The corporation can store, sell, or dispose of its imports in any manner it chooses without any report to any agency in the State of Alabama, or without the payment of any other tax, or without interference by the State in any way, except possibly in the enforcement of its inspection laws.

Appellant's tax will not be affected one cent by the volume of business done. Its sales, whether within or without Alabama could be a million or ten million or one hundred million dollars annually, but if it had only seven hundred thousand dollars capital employed in Alabama on December 31st, then the tax would be the same.

We respectfully submit that the following language in the Roberts case is applicable and decisive in the case at bar.

> "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

The Roberts case was cited approvingly in Armour & Co. vs. Virginia, 246 U. S. page 1, at page 7, where it was said:

"In other words, to resume, the error of the arguments results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and the indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. New York v. Roberts, 171 U. S. 658; Reymann Brewing Co. v. Brister, 179 U. S. 445."

While the line of demarcation between a tax on the sale of imports and a tax on the corporate franchise measured by property which consists of imports, is close and the argument that the taxation of the latter is permissible while the former is not, may seem a tenuous one, we submit that there is a distinction, and one which this Court has clearly recognized. This rule was elaborately discussed by Mr. Justice Stone in Educational Films Corp. v. Ward, supra. The immunity of the obligations of the United States Government from taxation is absolute. Yet in the measurement of a corporate excise tax, the income from such obligations may be included.

We respectfully submit that the rule should not be different when the immunity arises from definite grants to the Federal Government, such as are contained in the

interstate commerce and foreign commerce clause of the Constitution, than when the immunity arises under the implied powers of the Federal Government.

GENERAL ARGUMENT.

Appellant cites in support of its contention the following cases which we will discuss briefly:

Brown v. Maryland, 12 Wheat. 419, presents the original decision of Chief Justice Marshall holding that a State could not levy a license tax on the business of importers as such. There is no dispute as to the doctrine there laid down and since adhered to, but as was pointed out in the Roberts case, supra, the facts were not applicable.

Neither is Crew-Levick Co. v. Penn., 245 U. S. 292, pertinent under the facts in the present case. In that case the tax was measured by gross receipts—the necessary effect being to tax or affect each transaction.

Cook v. Penn., 97 U. S. 566, invalidated a tax measured by the amount of sales made by an auctioneer such goods consisting of imports in original packages. Again, the tax was on the business and affected every transaction.

Appellant relies principally upon the cases of Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 69 L. Ed. 916, and Ozark Pipe Line v. Monier, 266 U. S. 555.

It the former case it was conceded by the Attorney General that the corporation was engaged in Massachusetts *"exclusively in interstate commerce."*

The Massachusetts Act attempted to levy a tax measured by the amount of business done in Massachusetts. The Corporation had only a nominal amount of property in the State. All its business transactions were in inter-

state commerce. The tax had the necessary affect of taxing the business and to a certain extent each transaction. If we properly interpret this decision, it is distinguishable from the one at bar, because the tax was measured by and dependent on the operations of the company, all of which were admittedly interstate, while in the present case only the property in the State is used as a measurement, and the tax is not affected by the amount or character of Appellant's operations.

Ozark Pipe Line v. Monier presents the extreme position taken by this Court as we read the decisions. In this case the privilege tax was the right to do business. This holding of the Supreme Court of Missouri (282 Mo. 213) appears to have been of influence with this Court in determining the nature of the tax, and that together with the fact that the license or permit issued was to engage "exclusively in the business of transporting crude petroleum by pipe line," indicates at least that the Court considered this tax as a business tax rather than one purely on the corporate franchise.

In both of these cases Mr. Justice Brandeis dissented. We submit his dissent as expressed in the Monier case, expresses the correct rule applicable in the present case. The following quotations are deemed pertinent:

> "Nor is the tax laid upon the privilege of doing business: It is laid upon the privilege of carrying on business in corporate form; of doing so with a usual place of business within the state.'
>
> "The tax is held void solely on the ground that it is obnoxious to the commerce clause. A state tax is obnoxious to that provision of the Federal Constitution only if it directly burdens interstate commerce, or (where the burden is indirect) if it obstructs or discriminates against such commerce."

"There is no contention that, in fact, the tax discriminates against interstate commerce. The tax is applied alike whether the business done is interstate or intrastate, or both."

"Can it be said that this tax directly burdens interstate commerce? A tax is a direct burden if laid upon the operation or act of interstate commerce. Thus, a tax is a direct burden where it is upon property moving in interstate commerce (Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 67 L. Ed. 309, 25 A. L. R. 1195, 43 Sup. Ct. Rep. 146; Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. Ed. 227, 42 Sup. Ct. Rep. 101; United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 66 L. Ed. 234, 42 Sup. Ct. Rep. 105), or where, like a gross-receipts tax, it lays a burden upon every transaction in such commerce (Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 297, 62 L. Ed. 295, 299, 38 Sup. Ct. Rep. 126). But a tax is not a direct burden merely because it is laid upon an indispensable instrumentality of such commerce, or because it arises exclusively from transactions in interstate commerce. Thus, a tax is valid although imposed upon property used exclusively in intertstate commerce (Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 284, 25 L. Ed. 412, 415; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 306, 49 L. Ed. 1059, 1062, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100); or although laid upon net income derived exclusively from interstate commerce (United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. Ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 64 L. Ed. 445, 458, 40 Sup. Ct. Rep. 221). Compare William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. Ed. 1049, 38 Sup. Ct. Rep. 432; Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157, 40 Sup. Ct. Rep. 93. These taxes were held valid because, unlike a gross-receipts tax, they do not withhold, 'for the use of a state, a part of every dol-

lar received in such transactions' See 245 U. S. p. 297. Surely the tax upon the corporate franchise is as indirect as the tax upon the pipe line."

CONCLUSION.

We submit that the decision in the Roberts case, where the facts and the statute are almost identical with those of the case at bar should not be overturned. The principle there declared and reaffirmed in Armour & Co. v. Virginia, supra, supported by the Educational Films case, and as thus enunciated by Mr. Justice Brandeis should be controlling in the present case.

We respectfully submit the opinion and judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 377.—October Term, 1932.

Anglo-Chilean Nitrate Sales Corporation, Appellant, *vs.* The State of Alabama.	Appeal from the Supreme Court of the State of Alabama.

[February 6, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Appellant is a New York corporation having its principal office in that State. October 10, 1927, it qualified to do business in Alabama, and March 14, 1930, made and sent to the state tax commission a return showing that its only property in Alabama on December 31, 1929, the date as of which the statute required the statement to be made, was 33,455,763 pounds of nitrate of soda which had been imported by it from Chile into Alabama and stored in the original packages, the book value of which was $712,846.72. March 31, 1930, the commission under § 54 of No. 163, General Acts, 1927,[1] assessed against appellant for that year a franchise tax of $1,425.69, being at the rate of two dollars on each one thousand dollars of the value so reported.

[1]Section 54 of Act No. 163, Alabama General Acts, 1927, p. 176, provides: "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

For the derivation of this section see: § 16 of Act No. 464, General Acts, 1915, p. 397. § 16 of Act No. 328, General Acts, 1919, p. 291. § 11 of Act No. 172, General Acts, 1923, p. 164, as amended by Act No. 263, General Acts, 1923, p. 267.

Conformably to state practice appellant appealed to the circuit court of Montgomery county. The case was submitted on an agreed statement of facts the abridged substance of which follows.

From the date of its qualification in Alabama to the time of the assessment, appellant was engaged in the business of importing nitrate through the port of Mobile and other ports. The nitrate, in bags containing about 100 pounds each, was brought into Mobile and there stored by appellant in a public warehouse and kept in the original packages until sold and delivered to the ultimate consumers. All was sold upon orders through a salesman who, paying his own expenses, was compensated by commissions on his sales. The orders were taken subject to approval and were not effective until approved by appellant in its New York office. When so accepted, directions were given that the nitrate be forwarded to the customers. These directions were given to and carried out by the Walsh Stevedoring Company at Mobile, an independent contractor, having an arrangement with appellant to handle its importations of nitrate, store it in a public warehouse and forward it as directed.

All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. Such payments were sent to the Merchants National Bank at Mobile and by it immediately transferred to appellant in New York. Appellant had no bank account in Alabama and paid all expenses there by remittances from New York. On the date as of which appellant's return was made it had no accounts or bills receivable in Alabama and had no money there at any time except during the brief intervals that the funds were being so transmitted. It did not have or employ any capital in that State unless the importation through the port of Mobile, the storage and sale of nitrate in the manner above described constitutes capital and its employment there.

Section 54, under which the assessment was made, declares that every corporation organized under the laws of any other State and doing business in Alabama shall pay to the State an annual franchise tax of two dollars on each thousand dollars of the actual amount of capital employed therein. Appellant maintained below and here insists that the section, construed to impose the tax in question, is repugnant to the declarations of the

federal Constitution: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws", Art. I, § 10, cl. 2, and "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ". Art. I, § 8.

The Alabama statute in question was enacted in pursuance of § 232 of the state constitution which declares: No foreign corporation shall do any business in the State without having a place of business and an authorized agent therein and without filing with the secretary of state a certified copy of its articles of incorporation. "The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State." As to the meaning and purpose of the statute, we are governed by the construction put upon it by the state supreme court.

Its decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business. While the case at bar was pending on appeal there, the state supreme court in *State* v. *National Cash Credit Ass'n*, 224 Ala. 629, 632, held that the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise tax. Adverting to the language of the statute, it declared that the "property must be employed in a corporate business done in this state". On rehearing, May 19, 1932, and after its decision in the case before us, that court said: "We merely hold a franchise tax to be what it purports to be, a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax".

And in the case at bar the court said: "The defendant duly qualified as a foreign corporation to do business in this state, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the state appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from state taxation. . . . The statute here under review has no reference to imports, but is merely of a gen-

eral character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this state." And, after referring to the manner of appellant's acceptance of orders and the collections and remittances, the court said: "These details go to show the corporation was actually engaged in business in this state . . . . ". As appellant did no local business in the State, that decision plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate it imported into that State only for sale and that such sales constituted a business that is taxable under § 54. The Alabama statute is unlike that of Michigan examined here in *Detroit International Bridge Co.* v. *Michigan*, — U. S. —, and *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 342. There the tax upon a domestic corporation was imposed for the mere right to transact business.

The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax. In *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, we condemned as repugnant to the commerce clause a Missouri statute that required every foreign corporation engaged in business in that State to pay an annual franchise tax upon the privilege or right to do business. The company's business there consisted in the operation of a pipe line for interstate transportation of oil and in the ownership of property, the keeping of its principal office, purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines all in furtherance of such interstate commerce and constituting the means and instruments by which it was conducted. We held that the tax could not be constitutionally exacted, and that the facts that the foreign corporation was organized for local business and had applied for and received a local license conferring the power of eminent domain did not enable the State to tax its right to carry on interstate commerce. We said (p. 567): "The state has no such power even in the case of domestic corporations. See *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 342."

The question whether, consistently with the imports and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign

commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295.

The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom and, prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part of, the general mass of property within the State. The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from appellant the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. *Brown* v. *Maryland*, 12 Wheat. 419, 436, 442-444. In that case a state license fee imposed on an importer selling imported goods in the original bales or packages was condemned as repugnant to the imports and commerce clauses. Chief Justice Marshall said: (p. 444): "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . A tax on the occupation of an importer is . . . a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

In *Cook* v. *Pennsylvania*, 97 U. S. 566, the court held offensive to the same provisions a tax on the amount of the sales of imported goods in the original packages made by an auctioneer for the importer. In *May* v. *New Orleans*, 178 U. S. 496, the court (p. 507) formally reaffirmed and succinctly stated the propositions established in *Brown* v. *Maryland*, but held that the city tax there involved did not violate the imports or commerce clause because the imported goods were not sold in the original package.[2] And

[2]Cf. Austin *v.* Tennessee, 179 U. S. 343, 359. Cook *v.* Marshall County, 196 U. S. 261, 270. Kirmeyer *v.* Kansas, 236 U. S. 568, 573. Price *v.* Illinois, 238 U. S. 446, 454. Hebe & Co. *v.* Shaw, 248 U. S. 297, 304.

recently in *Willcutts* v. *Bunn*, 282 U. S. 216, we said (p. 228): "When the Constitution prohibits States from laying duties on imports, the prohibition not only extends to a tax upon the act of importing, but also to one upon the occupation of the importer or upon the articles imported. A tax on the sale of an article, imported only for sale, is a tax on the article itself. *Brown* v. *Maryland*, 12 Wheat. 419, 444." And see *Almy* v. *State of California*, 24 How. 169. *Fairbank* v. *United States*, 181 U. S. 283. *Selliger* v. *Kentucky*, 213 U. S. 200. *United States* v. *Hvoslef*, 237 U. S. 1. *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19. *Crew Levick Co.* v. *Pennsylvania*, *supra*. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 509. The constitutional protection extends to corporations as well as to individuals. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 108.

In support of its conclusion the state court cited and appellee relies upon *New York State* v. *Roberts*, 171 U. S. 658. The question for decision in the case now before us was not involved, presented or decided there. The statute of New York considered there imposed a tax on the business or franchise of domestic and foreign corporations except, among others, those wholly engaged in carrying on manufacture in the State. The taxpayer, Parke, Davis & Company, was a Michigan corporation. It had its factory in Detroit and a warehouse and depot in New York. It had a manager and over 50 employees there. It did local business and also sold in original packages goods received from its factory and goods imported for it from foreign countries. The tax rate was graded by the statute according to dividends (presumably paid out of net earnings). Cf. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321. The tax base was the amount of capital employed within the State and the comptroller fixed that amount at $90,000. The corporation, seeking to have the assessment set aside, took the case to the state supreme court. It sustained the assessment against the contention that the statute as construed by the comptroller was repugnant to the privileges and immunities clause, Art. IV, § 2, and held that the business was "not interstate commerce, which will prevent the corporation carrying it on from being taxed, . . ." 91 Hun 158, 162. No other federal question was considered. The court of appeals affirmed without opinion. In this court the corporation's principal insistence was that the statute was repugnant to the equal protection clause of the Fourteenth Amendment in that

it exempted domestic corporations manufacturing and selling in New York while imposing upon the Michigan corporation a discriminatory tax for selling in New York in original packages products manufactured in its Detroit factory. The court overruled that contention. The opinion shows that as to the amount of its capital employed in New York no federal question was presented. And, as admittedly the corporation did a local business in that State, i. e., business not included in interstate or foreign commerce (171 U. S. 659, 91 Hun 160), that case is essentially different from this one.

The decisions here since *New York State* v. *Roberts, supra,* definitely show that the power of the State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the State. And quite recently in *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, we said (p. 434): "Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114." See *Ozark Pipe Line* v. *Monier, supra. Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203. *Frost Trucking Co.* v. *R. R. Comm.,* 271 U. S. 583, 593, *et seq. Sprout* v. *South Bend,* 277 U. S. 163, 170-171. *New Jersey Tel. Co.* v. *Tax Board,* 280 U. S. 338, 346. *East Ohio Gas Co.* v. *Tax Comm.,* 283 U. S. 465, 470.

It follows that the Alabama statute, construed to impose a tax upon appellant for selling in that State in the original packages the nitrate imported by it from Chile, is repugnant to the imports and commerce clauses above quoted. And, as it did no other business in that State, it is not liable for any part of the tax that the state commission assessed against it.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES.

No. 377.—October Term, 1932.

Anglo-Chilean Nitrate Sales Corporation, Appellant, *vs.* State of Alabama, Appellee.	Appeal from the Supreme Court of the State of Alabama.

[February 6, 1933.]

Mr. Justice Cardozo, dissenting.

This case does not present the question that would be here if the appellant had not sought for and obtained a privilege or franchise to do a local business in the state of Alabama. There is nothing in the Alabama decisions, and little in her statutes, to indicate that the tax would have been sustained in the absence of such a grant, or that there would have been even an attempt to levy it. *Ewart* v. *American Cement Co.*, 9 Ala. App. 152, 156; *Citizens National Bank* v. *Buckheit*, 14 Ala. App. 511, 517, 519; *Tyson* v. *Jennings Produce Co.*, 16 Ala. App. 374, 375; *Ware* v. *Hamilton Brown Shoe Co.*, 92 Ala 145, 149; *Cook* v. *Rome Brick* Co., 98 Ala. 409, 413; *Stratford* v. *City Council of Montgomery*, 110 Ala. 619; Alabama Code of 1928, sec. 7217, limiting the application of sections 7209 to 7220. Indeed the Attorney General informed us on the argument that this would have been the position of his department of the Government, charged, as it is, with the collection of the revenues of the state. Alabama has said by her courts that it is beyond the power of the legislature to restrict by conditions the exercise or enjoyment of a privilege that has its origin and sanction in the constitution of the nation. See cases *supra*. Alabama has said by her statutes (Code, sec. 7217), that the permits and franchise taxes exacted of foreign corporations by article 26 of the Alabama Code do not apply to corporations "engaging in or transacting business of interstate commerce only", if the privilege they ask for is that and nothing more. The act now in question (Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, p. 176) was passed in fulfil-

ment of a mandate laid upon the legislature by section 232 of the Alabama Constitution. By that section it is provided that no foreign corporation shall do business in that state "without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association". By the same section: "the legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based upon the actual amount of capital employed in this state". It is this section that the courts of Alabama have adjudged to be inapplicable to interstate business. See cases *supra*. If that is the construction to be given to the command whereby the legislature was to establish a franchise tax and measure it in a certain way, there can be no doubt that the same construction must be given to the statute passed thereafter to give effect to the command. The power abjured in one breath was not exerted in the next.

With this approach to the problem, the pathway is made open. When the legislature of Alabama said in 1927 that an annual tax was imposed upon the franchise of every foreign corporation, it meant to lay the burden upon those franchises and those only which there was power in Alabama to grant or to withhold. If the corporation was there by virtue of a dual right, the one created by the state, and no other, was to be subjected to the charge. The presumption of that intention is hardly to be escaped in view of past disclaimers of a purpose more pretentious. True there is another section of the same act whereby a written permit is exacted for "the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the corporation", and its officers (Act No. 163, section 42). True also that for such a permit there is to be paid an annual tax varying from $5, the minumum, to $100, the maximum. The statute provides, however, that the tax imposed by that section shall be "in addition to other license or privilege taxes required to be paid by law". There is thus a tax in the nature of a fee to be paid in instalments as compensation for the permit, and another tax, measured by the capital in use within the state, upon the underlying franchise. The fee for the permit does not rebut the inference that there is

not to be a tax upon the franchise unless user is a privilege that issues from the state. Doubt, if there is any, will be resolved in favor of the construction that keeps the act alive.

The appellant was not satisfied to stand upon its federal right, though the state had made it plain that the claim of right would be respected. It was seeking something more, the privilege of going over the line that marks the federal immunity; and to that end it asked for and obtained a license or franchise, the name is unimportant, to do a local business as well as one related to interstate or foreign commerce. By the grant thus procured, it became free, at its unfettered will, to sell at wholesale or at retail, in the original packages or in others, unhampered by the restrictions that would have limited its capacity if it had been there as an importer and with the powers of an importer only. This franchise or privilege, this grant of benefits beyond any conferred by the federal constitution, the state of Alabama was competent to tax. *Home Ins. Co.* v. *N. Y.*, 134 U. S. 594; *Ashley* v. *Ryan*, 153 U. S. 436, 440; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227; *Lusk* v. *Botkin*, 240 U. S. 236; *St. Louis, S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City Ry.* v. *Stiles*, 242 U. S. 111, 117; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 489; *Detroit International Bridge Co.* v. *Corp. Tax Appeals Board*, — U. S., — December 5, 1932. There being competence to tax, there was competence to measure the burden of the payment by capital employed, irrespective of the use to which employment is directed. *Educational Films Corp.* v. *Ward, supra; Pacific Co.* v. *Johnson, supra; Flint* v. *Stone Tracy Co., supra; Home Ins. Co.* v. *N. Y., supra.* There may be a wrong to the taxpayer if the standard of measurement is oppressive and unreasonable. *W. U. Tel. Co.* v. *Kansas*, 216 U. S. 1. There is none where the standard bears a fair and natural relation, in its normal or average workings, to the privilege conferred.

The argument is made, however, that the tax though declared by the express terms of the statute to be a tax upon the "franchise", is confined to corporations "doing business" in Alabama, and hence is to be viewed as a tax upon the kind of business actually conducted, and not upon the franchise to conduct it in that or other ways. More than once a like argument directed to statutes phrased in the same way has been urged upon this court, only to be rejected as unsound. *Home Life Ins. Co.* v. *N. Y., supra;*

St. Louis, S. W. Ry. Co. v. *Arkansas, supra; L. & N. R. R. Co.* v. *Alabama,* 248 U. S. 533; 201 Ala. 317 (involving a statute of Alabama similar to this one); *Kansas City Ry.* v. *Stiles,* 242 U. S. 111, affirming 182 Ala. 138; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 145, 146. Thus, in *Home Life Ins. Co.* v. *N. Y., supra,* a statute provided that every corporation then or thereafter incorporated under any law of the state or of any other state or country, "and doing business in the state", should be subject to a tax "upon its corporate franchise or business", measured by its dividends. The court held that the tax was one upon the privilege "of doing business in a corporate capacity", and not upon the business or activities that were the outcome of the privilege. Cf. *Flint* v. *Stone Tracy Co., supra,* pp. 145, 146; *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, *Detroit International Bridge Co.* v. *Corp. Tax Appeals Board, supra.* There would be greater force in the appellant's argument if its construction of the tax as one upon the activity or the business had support in anything decided by the courts of Alabama. To the contrary, the highest court of the state has put that meaning aside by its opinion in this very case. Adopting the reasoning of this court in *Flint* v. *Stone Tracy Co., supra,* it has said that "the tax is an excise upon the particular privilege of doing business in a corporate capacity, and with the advantages derived therefrom". *State* v. *Anglo-Chilean Nitrate Sales Corp.,* 142 So. 87, 91; cf. *L. & N. R. R. Co.* v. *State,* 201 Ala. 317, 318; *Ellis* v. *Handley Mfg. Co.,* 214 Ala. 539; *Kansas City Ry. Co.* v. *Stiles,* 182 Ala. 138. True indeed it is that the corporation will be relieved of the burden if no business is transacted and no capital employed (*State* v. *National Cash Credit Association,* 141 So. 541), but so was the corporation in the *Home Life Insurance* case, and so also were the corporations in many other cases. *Flint* v. *Stone Tracy Co., St. Louis, S. W. Ry. Co.* v. *Arkansas, L. & N. R. R. Co.* v. *Alabama, Kansas City Ry. Co.* v. *Stiles, supra.* If the state has conferred a privilege which it is competent to tax, the competence is not lost, and the validity of the tax destroyed, because the privilege is to be free when the corporation is inactive. There is a requirement in the Alabama constitution, repeated in the statute, that the tax upon the franchise shall be measured by the capital employed within the state, a measure obviously inapplicable to dormant corporations. In such circumstances, activity is an event that conditions liability, but

the privilege, not the event, is still the subject of the burden. To resume the matter in a few words: the tax is not imposed upon those capacities and privileges that emanate by implication from the power of the nation. The tax is laid upon those privileges, and those only, that emanate either expressly or by implication from the power of the state. Business, it is true, must have been done, for without the doing of business there can be no capital employed. Even so, capital and business are by-products and incidents, like dividends or income. *Flint* v. *Stone Tracy Co.* They are the yardstick by which the state measures the value of the privilege. They are not the privilege itself.

The argument is made that "capital employed" is an illegal and arbitrary measure because the appellant has made no use of the taxable franchise emanating from the state, but has confined its activities to interstate or foreign commerce. What has been said in recent cases (*Educational Films Corp.* v. *Ward, supra,* and *Pacific Co.* v. *Johnson, supra*), goes far to give the answer. There was no attempt here as there was in *Western Union Telegraph Co.* v. *Kansas, supra,* or in *Looney* v. *Crane Co.,* 245 U. S. 178, or in *International Paper Co.* v. *Mass.,* 246 U. S. 135, or in other cases of that type, to burden a local privilege in close association with one not local by a levy upon values beyond the confines of the state. Cf. *Kansas City Ry. Co.* v. *Stiles,* 242 U. S. 111, 119; *Baltic Mining Co.* v. *Mass.,* 231 U. S. 68; *Wallace* v. *Hines,* 253 U. S. 66; *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Educational Films Corp.* v. *Ward, supra,* at p. 391. The measure here was capital employed in Alabama (*St. Louis, S. W. Ry.* v. *Arkansas, supra; L. & N. R. R. Co.* v. *Alabama, supra*); and it was a mere fortuity that in this instance the capital was made up of imports still intact. Moreover, what was done under the franchise one day might not be done under it the next. Another franchise tax would not be owing for a year. In the meantime the appellant might transact its business as it pleased. If some of its sales, however few and trifling, had been made in broken packages, there would be no denial by any one that the privilege of making them would be subject to taxation by one measure or another. This court has never held that the measure in such circumstances would be arbitrary and unlawful because determined by the value of all the local capital, and not merely the proportion necessary for sales in broken lots. In principle the situation would

then be governed by the ruling in *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, and *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511, where an apportionment very similar had the approval of this court. Especially must the standard hold when the statute is directed against foreign corporations generally, and not particularly against such of them as are engaged in interstate or foreign commerce. If the standard is a valid one when the privilege is used, it does not cease to be valid because user is abandoned or postponed. Very likely the statute might have been read in a different way. It might have been read as imposing two conditions, first that business should have been done, and second that what was done could be attributed, at least in part, to the actual exercise of the privileges granted by the state. As to such matters of construction the courts of the state may speak the final word. All that concerns us here is capacity or power. Here was no covert effort by the state to extend its taxing jurisdiction into an area denied to it. The burden upon interstate business in *Western Union* v. *Kansas* and the other cases cited, was an outcome inherent in the statutory scheme; it was the very event intended. The burden here, if there was any, was unforeseen and adventitious. Cf. *Plummer* v. *Coler,* 178 U. S. 115; *Kansas City Ry. Co.* v. *Stiles, supra.*

None of the decisions cited by the appellant controls the case at hand.

Ozark Pipe Line Corporation v. *Monier,* 266 U. S. 555, is invoked with special confidence. There are obvious distinctions. The statute of Missouri there held to be invalid in its application to a corporation engaged in interstate commerce was very similar in form to the statute of Alabama in controversy here. The conduct of the aggrieved corporation was, however, very different. Its business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state. In these circumstances the corporation asked for and obtained from Missouri a license to "engage *exclusively* in the business of transporting crude petroleum by pipe line". 266 U. S. at pp. 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident

of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state. The court condemned the tax for the reason that it read the statute as designed to lay a burden on the franchise to do business as an interstate carrier. The imputation of that design was borne out in a measure by the remedy, for the state had brought a suit not only to impress a lien upon the property, but to revoke the license altogether (p. 561), limited though it was. Cf. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 530. If there had been decisions in Missouri, as there are in Alabama, disclaiming a purpose to affect the federal privilege, and if the state and federal privileges had varied substantially from each other in meaning and in function, the parallel would be closer between the *Ozark* case and this. But if those conditions had been present, the result must have been changed.

Other cases, emphasized in the briefs, are still more faintly applicable.

Crew-Levick Co. v. *Pennsylvania,* 245 U. S. 292, brought before us a tax upon the business of foreign commerce, whether conducted by natural persons or by corporations. Its measure was the gross receipts. "It bears no semblance of a property tax or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise." 245 U. S. 297. Cf. *Phila. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326. The conclusion would have been different if net income, and not gross, had been adopted as the measure. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328; *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Shaffer* v. *Carter,* 252 U. S. 37, 52. The case has no relation to the validity of a tax to be measured by local capital and imposed upon a privilege.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203, dealt with a statute of Massachusetts, different in form from this, and interpreted as one laid directly upon the operations of the business. Cf. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196. No license or franchise to engage in a local business had been granted by the state.

Brown v. *Maryland,* 12 Wheat. 412, was a case of a discriminatory tax upon the business of importers, and *Cook* v. *Pennsylvania,* 97 U. S. 566, a case of a discriminatory tax upon an auc-

tioneer selling for importers. In neither was there a franchise, or a tax upon a franchise, or a reference to capital as a standard of measurement. In each the presence of imported packages to be subjected to a burden was an event considered and intended, not an adventitious circumstance developing unexpectedly in the application of the tax to one taxpayer out of many.

The tax imposed by this statute does not discriminate between domestic and foreign corporations to the prejudice of the latter. Domestic corporations pay a franchise tax that is measured by their whole capital; foreign corporations one that is measured by "the actual amount of capital employed" within the state. It does not discriminate between foreign corporations engaged in interstate or foreign commerce and other foreign corporations. It lays a burden on all impartially. Finally, it is not oppressive in amount, nor framed in such a form as to suggest a furtive purpose to stifle activities not covered by its terms. The tax is $2 per thousand dollars until 1932, and $1 per thousand afterwards. General Acts of Alabama, 1927, section 56, p. 177.

The appellant is in the enjoyment of a privilege of value which it solicited and received from the state of Alabama, and for that privilege it should pay.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this dissent.